163 - 703

TRANSCRIPT OF RECORD.

163-703

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 292.

GILMORE G. SCRANTON, PLAINTIFF IN ERROR,

vs.

EBEN S. WHEELER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED NOVEMBER 2, 1893.

(15,439.)

plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated, Dec. 22d, 1890.

E. HENRY LACOMBE,

Judge of the U. S. Circuit Court, Southern District of New York.

William H. Robertson, plaintiff in error, against Morris J. Drucker, defendant in error. Citation. Edward Mitchell, U. S. atty., attorney for plaintiff in error. Due service of a copy of the within citation is hereby admitted this 22 day of Dec., 1890. Charles Cook, attorney for defendant in error. U. S. circuit court, John A. Shields, clerk. Filed Dec. 23, 1890.

Endorsement on cover: Case No. 12,606. Term No. 328. William H. Robertson, collector of the port of New York, plaintiff in error, vs. Morris J. Drucker. Filed October 20, 1891. Case No. 12,615. Term No. 337. Morris J. Drucker, plaintiff in error, vs. William H. Robertson, collector of the port of New York. U. S. New York, C. C. U. S. Filed *[illegible]* October 26, 1891. Supreme Court U. S. Clerk's Office. Received Oct. 20, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1895.

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a United States Circuit Court of Appeals for the Sixth Circuit.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } No. 103.

In error to the circuit court of the United States for the western district of Michigan.

Record.

Filed February 4, 1893.

WALTER S. HARSHA, *Clerk.*

Harlow P. Davock, Detroit, Mich., attorney for plaintiff in error.
Lewis G. Palmer, Grand Rapids, Mich., attorney for defendant in error.

1 United States Circuit Court of Appeals for the Sixth Circuit.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } No. 103.

In error to the circuit court of the United States for the western district of Michigan.

Transcript on Removal.

Declaration.

The Circuit Court for the County of Chippewa.

STATE OF MICHIGAN, *County of Chippewa,* } *ss:*

Gilmore G. Scranton, plaintiff herein, by Harlow P. Davock, his attorney, comes and files this his declaration as commencement of suit, and complains of Eben S. Wheeler, defendant herein:

For that, whereas, the said plaintiff, on the twentieth day of February, in the year one thousand eight hundred and ninety-
2 one, was the owner in fee and possessed of the following real estate and premises, situate in the city of Sault Ste. Marie, county of Chippewa, in said State of Michigan, and being known and designated as an undivided one-half interest, or portion of, in and to private land claim number three (3), Whelpley's survey, in the village of Sault Ste. Marie, Michigan, which said premises the said plaintiff claims in fee.

And he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit: on the twenty-first day of February, in said last-mentioned year, entered into said premises, and unlawfully withholds from said plaintiff the possession thereof, to the damage

of said plaintiff thirty-five thousand dollars, and therefore he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff, Detroit, Mich.

BRENNAN & DONNELLY, *Of Counsel.*

STATE OF MICHIGAN, } ss:
County of Chippewa, }

Gilmore G. Scranton, being duly sworn, deposes and says: That on the 16th day of May, 1891, I served a true copy of the within declaration, together with notice of rule, to appear and plead endorsed thereon, as is hereon endorsed, on Eben S. Wheeler, the defendant named in said declaration, by delivering to him personally said copy and notice in the county of Chippewa, State aforesaid, and a true copy of the foregoing notice to appear and plead endorsed thereon, as herein endorsed.

GILMORE G. SCRANTON.

Subscribed and sworn to before me this 20th day of May, 1891.
WILLIAM WEBSTER,
Notary Public.

3 *Plea.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON, Plaintiff, }
vs. } Ejectment.
EBEN S. WHEELER, Defendant. }

And now comes said defendant, by Lewis G. Palmer, his attorney, and demands a trial of the matters set forth in the plaintiff's declaration herein.

Dated June 2, 1891.

LEWIS G. PALMER,
Defendant's Attorney.

STATE OF MICHIGAN, } ss:
County of Chippewa, }

Andrew Jackson, being duly sworn, deposes and says: That he is the surety named in and who executed the annexed bond in the matter of the removal of the case of Gilmore G. Scranton *vs.* Eben S. Wheeler to the United States court; that he is worth at least the sum of five hundred dollars over and above all his debts, liabilities and exemptions, in property situated in said county and State, and that he is a resident of said county.

ANDREW JACKSON.

Subscribed and sworn to before me this 11th day of June, 1891.
WILLIAM WEBSTER,
Notary Public.

4 *Bond on Removal.*

Know all men by these presents, that Eben S. Wheeler, of Sault Ste. Marie, Michigan, as principal, and Andrew Jackson, of Sault Ste. Marie, Michigan, as surety, are held and firmly bound unto Gilmore G. Scranton in the sum of three hundred dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, representatives and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 3d day of June, 1891.

Whereas, said Eben S. Wheeler has petitioned the circuit court for the county of Chippewa, Michigan, for the removal of a certain cause therein pending, wherein said Gilmore G. Scranton is plaintiff and said Eben S. Wheeler defendant, to the circuit court of the United States for the northern division of the western district of Michigan:

Now, therefore, the condition of this obligation is such that if said Eben S. Wheeler shall enter in said United States court on the first day of its next session a copy of the record in said cause, and shall *and* well and truly and promptly pay all costs that shall be awarded by said United States court, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

EBEN S. WHEELER. [SEAL.]
ANDREW JACKSON. [SEAL.]

5 *Petition for Removal.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant.

To the circuit court for the county of Chippewa:

The petition of said Eben S. Wheeler, defendant, respectfully represents that he is employed by the Government of the United States in the War Department thereof as assistant engineer in local charge of the work of improving Hay Lake channel and Saint Mary's river, and is the general superintendent of Saint Mary's Falls canal, and charged with its operation and care.

That he was so employed and held the same office with the same duties at the time of the commencement of this suit.

That this suit involves the question of the riparian right of the plaintiff, arising out of his ownership of the lands described in the declaration in this cause; which lands are opposite to and are

fronted by the Government pier, extending into the waters fronting upon the lands described in the declaration herein.

That your petitioner is made the defendant in this cause by reason of his being the official in charge of the said Government pier, and not by reason of any personal interest which he has in the said lands or any rights arising under the ownership thereof;

6 and that your petitioner has and claims no rights whatever of a personal nature in said lands or the waters fronting thereon, and hereby disclaims any such right and claim.

That the matter in dispute in this cause exceeds exclusive of costs the sum and value of more than two thousand dollars; and that this suit arises under the laws of the United States, as will be more particularly shown hereafter.

That the original project for the construction of said Government pier was contained in the report of G. Weitzel, major of engineers, for the year 1876, a copy of that part of said report relating to said pier being herein annexed and marked Exhibit 1.

That by an act approved August 14, 1876, entitled "An act making appropriations for the construction, repair, preservation and completion of certain public works on rivers and harbors, and for other purposes," the Congress of the United States appropriated one hundred and thirty thousand dollars for the improvement of Saint Mary's river and Saint Mary's Falls canal aforesaid, to be expended under the direction of the Secretary of War.

That pursuant to said act, the Secretary of War, through the chief of engineers, ordered said major of engineers to submit a project for the expenditure of this sum, a copy of which said order is hereto annexed, marked Exhibit 2.

That pursuant to said order, said major of engineers submitted such project for beginning the construction of said Government pier, a copy of which is hereto annexed, marked Exhibit 3.

That said project was duly approved, as appears by letter of date May 7, 1877, a copy of which is hereto annexed, marked Exhibit 4, and the construction of the said Government pier was thereupon begun, and subsequently completed.

7 That by an act approved June 14, 1880, entitled "An act making appropriations for the construction, repair, completion and preservation of certain works on rivers and harbors, and for other purposes," the Congress of the United States authorized the Secretary of War to accept the Saint Mary's Falls canal from the State of Michigan, under certain provisions, reference to which act is hereby made.

That by an act approved March 3, 1881, entitled "An act to authorize the board of control to transfer the Saint Mary's Falls ship canal, with the property belonging to the same, to the United States," the legislature of the State of Michigan authorized the transfer of said canal under certain provisos, reference to which act is hereby made.

That the transfer of said canal in accordance with said two acts was finally effected on the ninth day of June, 1881.

That by the fourth and seventh sections of an act approved July

5, 1884, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," the Congress of the United States made it the duty of the Secretary of War to prescribe rules and regulations for the use and administration of said Saint Mary's Falls canal.

That the rules and regulations prescribed by the Secretary of War in accordance with said act are shown by a printed copy thereof, hereto attached, marked Exhibit 5.

That the Government pier hereinbefore referred to, and which gives rise to this suit to test the riparian rights of said plaintiff as aforesaid, is a prolongation westward into deep water of the bank of said canal, and shelters the Lake Superior entrance to said canal,
and is a part of said canal, and comes under the said rules
8 and regulations prescribed for the use and administration of said canal.

That the United States is the real party in interest in the defense of said cause, and that the defense of said cause depends upon the laws of the United States, and that said suit arises thereunder, and by reason of acts performed under the laws of the United States.

That herewith your petitioner offers a good and sufficient surety for his entering, in the circuit court of the United States for the northern division of the western district of Michigan, on the first day of its next session, a copy of the whole record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner elects and prays for the removal of this cause to said circuit court of the United States, and that this court proceed no further in this cause except to make an order for removal required by law, and to accept said bond and to cause the record herein to be removed from this court to said United States court; and your petitioner hereby claims the benefit of the provisions of the act of Congress of the United States, approved March 3, 1887, as corrected and re-enacted August 13, 1888, providing for the removal of causes from State courts to the United States courts.

EBEN S. WHEELER.

LEWIS G. PALMER,
Attorney for said Defendant.

STATE OF MICHIGAN, } ss:
County of Chippewa, }

On this 3d day of June, 1891, before me, personally appeared
Eben S. Wheeler, known to me to be the same person named
9 in and who subscribed the foregoing petition, and made oath
that he has read the said petition by him subscribed and knows the contents thereof, and that the same is true in substance and in fact.

[SEAL.]

ANDREW JACKSON,
Notary Public, Chippewa County, Mich.

Exhibits to Petition.

Exhibit No. 1.

In addition to this approved project, I now respectfully submit one for the improvement of the upper entrance of the canal.

There is an error in it which is a source of great loss of time and money, and may be the source of serious injury — the vessels using the canal. The entrance is narrow, with shoal water on the south side of it, and the current produced by the falls is almost directly across it. As stated in my letter dated April 25th, 1876, to the chief of engineers, the larger number of vessels passing the canal arrive in tows containing two to six vessels each. It is not considered safe by the captains to bring in more than one, or at most two vessels at a time; the tow, if containing more than this number, must be broken up and a part left at anchor outside, to be brought in subsequently. Approaching the entrance the vessels drift across it rapidly. As soon as the tug passes the end of the pier it is in still water, but the rear vessels continue drifting, often barely making the entrance. They then have a direction oblique to the canal, sometimes striking the pier heavily and alternately on opposite sides, and they are hardly brought under control until the guard-gates, 1,700 feet below the entrance, are reached.

In its present condition the upper entrance to the canal is a constant source of danger and delay to navigation, and a constant cause of injury to the revetment of the canal. Any plan of improving the canal which leaves this entrance as it now exists would be an imperfect one.

The additional project now submitted comprises straightening the south bank of the canal, building a pier on the new line to deep water and excavating to canal bottom the area between the new pier line and the present channel. This would more than double the width of the entrance and tows of vessels would make it under shelter of the south pier without delay or danger. The estimated cost of this additional project is as follows, viz:

115,000 cubic yards of earth excavation, at 30c.....	$44,500
30,000 cubic yards (gravel bowlders and old pier), at 75c.....	22,500
1,300 cubic yards rock excavation, at $4.00	52,000
200,000 feet of timber in pier, at 27c.....	54,000
125,000 pounds iron bolts, at 3c.....	3,750
40,000 cubic yards filling behind pier, at 35c.....	14,000
	$190,750
Add for contingencies and superintendence.....	19,250
	$210,000

A true copy of a portion of the annual report of Major Godfrey Weitzel, corps of engineers, U. S. Army, for the fiscal year ending June 30, 1876.

O. M. POE,
Colonel Corps of Engineers, etc.,
Bvt. Brig. Gen., U. S. Army.

11 EXHIBIT No. 2.

Received May 3, 1877.

G. WEITZEL.

OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, D. C., *May* 1, 1877.

Major G. Weitzel, corps of engineers, Detroit, Mich.

SIR: The Secretary of War has, upon the recommendation of the chief of engineers, authorized the expenditure of the following sums appropriated by the river and harbor act of August 14, 1876, for the works in your charge named below:

For the improvement of Saint Mary's river and Saint Mary's Falls canal, Mich	$130,000
For the improvement of the harbor at Cheboygan, Mich	10,000
For the improvement of the harbor at Thunder Bay, Mich	4,500

You are accordingly requested to submit projects for the application of the funds thus made available, stating in each case how it is proposed to carry on the work, whether by contract after advertising in the usual way or by hired labor and open purchase, reference being had in this connection to the clause in the river and harbor act defining the duties of the Secretary of War in regard to the application of the moneys therein appropriated.

By command of Brig. Gen. Humphreys.

Very respectfully your obedient servant,

JOHN G. PARKE,
Major of Engineers.

756—R. & H., '77.

A true copy.

O. M. POE,
Colonel Corps of Engineers, Bvt. Brig. General, U. S. A.

12 EXHIBIT No. 3.

MAY 4, 1877.

Brig. Gen. A. A. Humphreys, chief of engineers, U. S. A., Washington, D. C.

GENERAL: I have the honor to transmit herewith for your approval a project of operations and a copy of the advertisement, instructions and specifications for continuing the improvement of the St. Mary's Falls canal, Michigan, under act of Congress approved August 14, 1876.

If approved, I respectfully request that the inclosed letter be forwarded to the chief clerk of the War Department for authority to publish the advertisement and to have 300 copies of the specifications, etc., printed.

I am, General, very respectfully, your obedient servant,

G. WEITZEL,
Major of Engineers.

(2 enclosures.)

Project of operations for continuing the improvement of the St. Mary's Falls canal, Michigan, under act of Congress approved August 14, 1876, appropriating $130,000.00 for that work.

It is proposed to expend $70,000.00 of this appropriation in completing the construction of the walls of the new locks of the canal, and $60,000.00 in straightening the canal at its head—$40,000.00 of which is to be expended in dredging, and $20,000.00 in construction of pier.

It is proposed to do the construction of the lock-walls and the dredging by contract, reserving 10 per cent. until the work is completed.

The pier-work should be done by hired labor and purchase
13 of material in open market, because it is not known what kind of foundation for the cribs will be necessary, and this knowledge can only be obtained as the work progresses. It would therefore be impossible to make approximate estimates or invite specifications until at least the amount of work has been done by us in the manner proposed.

Respectfully submitted.

G. WEITZEL,
Major of Engineers.

A true copy.

O. M. POE,
Colonel Corps of Engineers, &c., Bvt. Brig. Gen., U. S. A.

EXHIBIT No. 4.

Received May 9, 1877.

G. WEITZEL.

OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, D. C., *May* 7, 1877.

Major G. Weitzel, corps of engineers, Detroit, Mich.

SIR: Your letter of the 4th inst., submitting for approval project and copy of the advertisement, instructions and specifications for continuing the improvement of the St. Mary's Falls canal, Michigan, under the appropriation made therefor by the act of August 14, 1876, has been received.

Your project is approved. The construction of the lock-walls and the dredging to be done by contract after advertisement for proposals.

The pier-work to be done by hired labor and open purchase, it being impracticable to make specific estimates for same.

14 Your letter to the chief clerk of the War Department has been forwarded with favorable endorsement.

By command of Brig. Gen. Humphreys.

Very respectfully your obedient servant,

JOHN G. PARKE,
Major of Engineers.

820—R. H., '77.

A true copy.

O. M. POE,
Colonel Corps of Engineers, Bvt. Maj. Gen., U. S. A.

EXHIBIT No. 5.

Rules and Regulations for the Government of St. Mary's Falls Canal, Mich.

In accordance with the provisions of section 7 of the act of Congress approved July 5, 1884.

Rule 1st. The movements of all vessels, boats, and other floating things, in the canal and locks, shall be under the direction of the superintendent and his assistants.

Rule 2d. All steamers desiring to use the locks, shall signal for the same by two long and two short blasts of the whistle.

Rule 3d. All tows shall enter and pass through the canal with towlines less than four hundred feet in length.

Rule 4th. In passing the canal, vessels and boats belonging to the United States Government shall have precedence over all others. All registered merchant vessels must pass through the canal and locks in the order of their arrival at the canal, unless otherwise directed by the superintendent or his assistant in charge. Unregistered craft will not be locked separately unless specially permitted.

15 Rule 5th. All boats waiting above the locks for lockage, must be kept at least 400 feet above the upper gates; and those waiting below the locks, must be kept at least 200 feet below the lower gates.

Rule 6th. Masters or clerks of vessels or boats shall report in person at the office of the superintendent on each passage, and make such statement of passengers, freight and registered tonnage as he may require.

Rule 7th. No business, trading, or landing of freight or baggage, will be allowed on or over the canal piers or lock-walls, except such small articles as may be readily carried in the hand, so as not to delay navigation or obstruct the operating of the locks.

Rule 8th. Vessels or boats may be moored to the piers only when specially permitted by the superintendent, and then only in such places and for such times as he may direct.

Rule 9th. No material of any kind shall be thrown into the canal. Flues shall not be cleaned in the locks.

Rule 10th. All persons are prohibited from wilfully or carelessly damaging the canal, or any part thereof.

Rule 11th. All boats using the canal must be free from projecting irons or rough surfaces, that would be liable to damage the lock walls or canal piers.

Rule 12th. No vessel or boat shall in any way obstruct the canal, or delay in passing through, unless permitted to do so by the proper authority. The neglecting of any lawful order shall be construed as obstructing the free navigation of the canal.

Extract from act approved August 14, 1876.

SEC. 3. * * * Any person who shall wilfully and unlawfully injure any pier, break-water or other work of the United States for the improvements of rivers or harbors or navigation in the
16 United States, shall, on conviction thereof, be punished by a fine not exceeding one thousand dollars.

Extract from act of Congress approved July 5, 1884.

* * * * * * *

SEC. 7. That it shall be the duty of the Secretary of War to prescribe such rules and regulations in respect to the use and administration of the Des Moines Rapids canal, the St. Mary's Falls canal, and the Louisville and Portland canal, as in his judgment the public necessity may require; which rules and regulations shall be posted in some conspicuous place for the information of the public. Any person knowingly and wilfully violating such rules and regulations shall be liable to a fine not exceeding five hundred dollars, or imprisonment not exceeding six months; to be enforced in any district court of the United States within whose territorial jurisdiction such offense may have been committed.

* * * * * * *

Published by order of the Secretary of War.

O. M. POE,
Colonel of Engineers, Bvt. Brig. Gen., U. S. A.

STATE OF MICHIGAN, }
Chippewa County, } *ss:*

I, Wm. Webster, clerk of the circuit court of said county, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of the files in the cause of Gilmore G. Scranton *vs.* Eben S. Wheeler with the original record and files thereof now remaining in my office, and have found the same to be a correct transcript therefrom, and the whole of such original record and files.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Sault Ste. Marie, this 12th day of June, A. D. 1891.

[SEAL.]

WM. WEBSTER.

17 *Stipulation Amending Declaration.*

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant. } No. 325.

It is hereby stipulated that the description in the original declaration in this cause be amended as follows: "Situated in the city of Sault Ste. Marie, in said county of Chippewa, State of Michigan, and being known and designated as an undivided one-half interest or portion of, in and to private land claim number three (3), Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the plaintiff claims in fee." Said amended declaration to stand as of the time of filing the original declaration in said cause. It is further stipulated that the plea to the original declaration now on file stand as the plea to said amended declaration, and though filed as of the date of the original plea.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

L. G. PALMER,
Attorney for Defendant.

18 *Amended Declaration.*

STATE OF MICHIGAN:

The Circuit Court for the County of Chippewa.

COUNTY OF CHIPPEWA, *ss:*

Gilmore G. Scranton, plaintiff in this suit, by Harlow P. Davock, his attorney, comes into court, according to the form of the statute in such case made and provided, and filing this, his declaration as commencement of suit, complains of Eben S. Wheeler, defendant in this suit:

For that, whereas, the said plaintiff heretofore, to wit: on the twentieth day of February, in the year one thousand eight hundred and ninety-one, was the owner in fee and possessed of the following real estate and premises, with the appurtenances, situated in the city of Sault Ste. Marie, in said county of Chippewa, State of Michigan, and being known and designated as an undivided one-half interest, or portion of, in and to private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St.

Mary's river from the river bank on said lot to the thread of
stream of said river, which forms a part of said lot, and all ripar
rights belonging and attached thereto, and being a part ther
which said premises the said plaintiff claims in fee; and he,
said plaintiff, being so possessed thereof, the said defendant af
wards, to wit: on the twenty-first day of February, in the year
thousand eight hundred and ninety-one, entered into the said pre
ises and ejected the said plaintiff therefrom, and the said plain
being lawfully entitled to the possession of said premises, the sa
defendant unlawfully withholds from said plaintiff the po
19 session thereof, to the damage of said plaintiff of thirty-fi
thousand dollars, and, therefore, he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

BRENNAN & DONNELLY, *Of Counsel.*

Trial.

UNITED STATES OF AMERICA:

Adjourned September Term, A. D. 1892.

TUESDAY, *September 13th*, 1892.

At an adjourned session of the circuit court of the United States
for the sixth circuit and western district of Michigan, northern
division, begun and held at the United States court-rooms, in the
city of Marquette, in said district and division, on Tuesday, the
thirteenth day of September, A. D. one thousand eight hundred and
ninety-two, and of the year of Independence the one hundred
seventeenth.

Present: Hon. Henry F. Severens, U. S. district judge.

In case of—

GILMORE G. SCRANTON }
vs.
EBEN S. WHEELER. }

The parties in this cause being in court by their respective attor-
neys, and ready for trial, thereupon came a jury, to wit: Abel F.
Agnew, Charles D. Fournier, Thomas Hay, James Milford, Frank
Jacobs, Herman Haven, J. B. Freshette, A. McDougal, Schuyler
Farrell, Peter Trudell, Frank Provo and Edwin Henwood,
20 good and lawful men, who being duly impaneled, tried and
sworn well and truly to try the issue between the parties.
And thereupon, on application and by consent of the parties to this
cause, it is ordered that Will A. Brown be and hereby is appointed
reporter in this cause, and that a transcript of his stenographic
notes shall constitute the official record of the testimony taken in
this cause, and the said jury sat together and heard the evidence
this day adduced.

Whereupon the court adjourned until Wednesday, September
14th, 1892, at 9 a. m.

Verdict and Judgment.

UNITED STATES OF AMERICA:

Adjourned September Term, A. D. 1892.

WEDNESDAY, *September 14th*, 1892.

Court opened pursuant to adjournment.
Present: Hon. Henry F. Severens, U. S. district judge.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

The jury heretofore duly impaneled and sworn in this case sat together and heard the conclusion of the evidence, the arguments of counsel, and without leaving their panel, and by direction of the court, say upon their oaths that the defendant is not guilty of unlawfully withholding the lands and premises as described in the plaintiff's declaration. Therefore it is considered that the said plaintiff take nothing by his suit, and that the said defendant do go thereof without day; and it is further considered that
21 the said defendant do recover against the said plaintiff his costs and charges by him, about his defense in this behalf expended to be taxed, and that the said defendant have execution thereof; and on motion of plaintiff's counsel it is ordered that plaintiff be and hereby is allowed ninety days in which to prepare a bill of exceptions.

Stipulation Extending Time to Settle Bill of Exceptions.

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

It is hereby stipulated in the above-entitled cause that the time to settle the bill of exceptions be extended sixty days from December 10th, 1892.

Dated December 5th, 1892.

H. P. DAVOCK,
Attorney for Plaintiff.

L. G. PALMER,
Attorney for Defendant.

Mary's river from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto, and being a part thereof, which said premises the said plaintiff claims in fee; and he, the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit: on the twenty-first day of February, in the year one thousand eight hundred and ninety-one, entered into the said premises and ejected the said plaintiff therefrom, and the said plaintiff being lawfully entitled to the possession of said premises, the said defendant unlawfully withholds from said plaintiff the pos-
19 session thereof, to the damage of said plaintiff of thirty-five thousand dollars, and, therefore, he brings suit, etc.

HARLOW P. DAVOCK,
Attorney for Plaintiff.

BRENNAN & DONNELLY, *Of Counsel.*

Trial.

UNITED STATES OF AMERICA:

Adjourned September Term, A. D. 1892.

TUESDAY, *September 13th*, 1892.

At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, begun and held at the United States court-rooms, in the city of Marquette, in said district and division, on Tuesday, the thirteenth day of September, A. D. one thousand eight hundred and ninety-two, and of the year of Independence the one hundred seventeenth.

Present: Hon. Henry F. Severens, U. S. district judge.

In case of—

GILMORE G. SCRANTON }
vs.
EBEN S. WHEELER. }

The parties in this cause being in court by their respective attorneys, and ready for trial, thereupon came a jury, to wit: Abel F. Agnew, Charles D. Fournier, Thomas Hay, James Milford, Frank Jacobs, Herman Haven, J. B. Freshette, A. McDougal, Schuyler Farrell, Peter Trudell, Frank Provo and Edwin Henwood,
20 good and lawful men, who being duly impaneled, tried and sworn well and truly to try the issue between the parties. And thereupon, on application and by consent of the parties to this cause, it is ordered that Will A. Brown be and hereby is appointed reporter in this cause, and that a transcript of his stenographic notes shall constitute the official record of the testimony taken in this cause, and the said jury sat together and heard the evidence this day adduced.

Whereupon the court adjourned until Wednesday, September 14th, 1892, at 9 a. m.

Verdict and Judgment.

UNITED STATES OF AMERICA:

Adjourned September Term, A. D. 1892.

WEDNESDAY, *September 14th*, 1892.

Court opened pursuant to adjournment.
Present: Hon. Henry F. Severens, U. S. district judge.

GILMORE G. SCRANTON }
vs.
EBEN S. WHEELER. }

The jury heretofore duly impaneled and sworn in this case sat together and heard the conclusion of the evidence, the arguments of counsel, and without leaving their panel, and by direction of the court, say upon their oaths that the defendant is not guilty of unlawfully withholding the lands and premises as described in the plaintiff's declaration. Therefore it is considered that the said plaintiff take nothing by his suit, and that the said defendant do go thereof without day; and it is further considered that
21 the said defendant do recover against the said plaintiff his costs and charges by him, about his defense in this behalf expended to be taxed, and that the said defendant have execution thereof; and on motion of plaintiff's counsel it is ordered that plaintiff be and hereby is allowed ninety days in which to prepare a bill of exceptions.

Stipulation Extending Time to Settle Bill of Exceptions.

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

GILMORE G. SCRANTON }
vs.
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It is hereby stipulated in the above-entitled cause that the time to settle the bill of exceptions be extended sixty days from December 10th, 1892.

Dated December 5th, 1892.

H. P. DAVOCK,
Attorney for Plaintiff.

L. G. PALMER,
Attorney for Defendant.

EXHIBIT 3.

Deed.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, under the provisions of the act of Congress, approved the 26th day of September, 1850, entitled "An act providing for the examination and settlement of claims for land at the Sault
22 Ste. Marie, in Michigan, the claim of Samuel Peck and heirs of Franklin Newcomb has been confirmed to a tract or parcel of land designated on the connected plat of survey, approved under date of September 4th, 1855, by the surveyor general at Detroit, made pursuant to the act aforesaid as lot number three, containing nineteen acres and forty-five one-hundredths of an acre, in section one, in township forty-seven north of range one west and in section six, in township forty-seven north of range one east, in the district of lands subject to sale at Marquette, formerly Sault Ste. Marie, in the State of Michigan. And, whereas, there has been deposited in the General Land Office of the United States a certificate No. 111, of the register and receiver at Marquette, Michigan, whereby it appears that payment has been made in full, according to law, of the amount of assessment on said claims.

Now know ye that the United States of America, in consideration of the premises and in conformity to the provisions of the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said Samuel Peck, and heirs of Franklin Newcomb, and to their heirs, the tract or parcel of land above described; to have and to hold the same, together with all the rights, privileges and immunities and appurtenances of whatever nature thereunto belonging, unto the said Samuel Peck and heirs of Franklin Newcomb and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

[SEAL.]

Given under my hand, at the city of Washington, the sixth
23 day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

By the President.

U. S. GRANT,
By S. D. WILLIAMS, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded vol. 1, page 164.

STATE OF MICHIGAN, } ss:
Register's Office, Chippewa County, }

This is to certify that I have compared the annexed copy of deed recorded in Liber 5 of Deeds, on page 217, with the original now remaining of record in this office, and that the same is a true and correct copy of such original, and all of such original.

In testimony whereof I have hereunto set my hand and seal this 29th day of August, 1891.

[SEAL.] LOUIS P. TREMP,
Register of Deeds.

(Endorsed on back.)

United States to Peck & Newcomb. Certificate No. 111. Register's office, Chippewa Co., Mich. Received for record the 18th day of December, A. D. 1874, at 9 o'clock a. m., and recorded in Liber 5 of Deeds on page 217. Guy H. Carleton, register.

EXHIBIT 6.

Field-notes.

STATE OF MICHIGAN:

State Land Office—Official Certificate.

LANSING, *Aug. 26th,* 1891.

I, Geo. T. Shaffer, commissioner of the State land office, do
24 hereby certify that the annexed is a true copy of the field-notes of private claim No. 3, village of Sault Ste. Marie, surveyed by Thomas Whelpley.

That I have carefully compared the said copy with the original thereof now on file and of record in my office, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed. Done at the city of Lansing on the day and year above written.

[SEAL.] GEO. T. SHAFFER,
Commissioner of the State Land Office.

Town. 47 north, range one west, Mich.

LAND OFFICE, *August 26th,* 1891.

Field-notes of United States Survey of Private Claim Number 3, Sault Ste. Marie, by Thomas Whelpley.

Claim number 3, Samuel Peck and Franklin Newcomb.

First part claim number 3 began at post number $\frac{1}{3}$ cedar, 2 feet 9 inches long, $3\frac{1}{2}$ inches by $2\frac{3}{4}$ inches, and one foot out of ground, west side Meridian street, 50 links north, 88 degrees 50 minutes west from quarter-section post, east side section 1, town. 47 north, range 1 west; thence north along west side Meridian street 7 chains

EXHIBIT 3.

Deed.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, under the provisions of the act of Congress, approved the 26th day of September, 1850, entitled "An act providing for the examination and settlement of claims for land at the Sault
22 Ste. Marie, in Michigan, the claim of Samuel Peck and heirs of Franklin Newcomb has been confirmed to a tract or parcel of land designated on the connected plat of survey, approved under date of September 4th, 1855, by the surveyor general at Detroit, made pursuant to the act aforesaid as lot number three, containing nineteen acres and forty-five one-hundredths of an acre, in section one, in township forty-seven north of range one west and in section six, in township forty-seven north of range one east, in the district of lands subject to sale at Marquette, formerly Sault Ste. Marie, in the State of Michigan. And, whereas, there has been deposited in the General Land Office of the United States a certificate No. 111, of the register and receiver at Marquette, Michigan, whereby it appears that payment has been made in full, according to law, of the amount of assessment on said claims.

Now know ye that the United States of America, in consideration of the premises and in conformity to the provisions of the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said Samuel Peck, and heirs of Franklin Newcomb, and to their heirs, the tract or parcel of land above described; to have and to hold the same, together with all the rights, privileges and immunities and appurtenances of whatever nature thereunto belonging, unto the said Samuel Peck and heirs of Franklin Newcomb and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

[SEAL.]

Given under my hand, at the city of Washington, the sixth
23 day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

By the President.

U. S. GRANT,
By S. D. WILLIAMS, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office.

Recorded vol. 1, page 164.

STATE OF MICHIGAN, } ss:
Register's Office, Chippewa County, }

This is to certify that I have compared the annexed copy of deed recorded in Liber 5 of Deeds, on page 217, with the original now remaining of record in this office, and that the same is a true and correct copy of such original, and all of such original.

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24 hereby certify that the annexed is a true copy of the field-notes of private claim No. 3, village of Sault Ste. Marie, surveyed by Thomas Whelpley.

That I have carefully compared the said copy with the original thereof now on file and of record in my office, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed. Done at the city of Lansing on the day and year above written.

[SEAL.] GEO. T. SHAFFER,
Commissioner of the State Land Office.

Town. 47 north, range one west, Mich.

LAND OFFICE, *August 26th*, 1891.

Field-notes of United States Survey of Private Claim Number 3, Sault Ste. Marie, by Thomas Whelpley.

Claim number 3, Samuel Peck and Franklin Newcomb.

First part claim number 3 began at post number ½ cedar, 2 feet 9 inches long, 3½ inches by 2¾ inches, and one foot out of ground, west side Meridian street, 50 links north, 88 degrees 50 minutes west from quarter-section post, east side section 1, town. 47 north, range 1 west; thence north along west side Meridian street 7 chains

87 links to post numbered $\frac{1}{4}$ cedar, 2 feet 5 inches long, $2\frac{1}{2}$ by $2\frac{3}{4}$ inches, 11 inches out of ground, northeast corner south side of Ridge street; north 88 degrees 50 minutes west along south side of Ridge street 5 chains 25 links, number on post $\frac{1}{3}$ cedar, 2 feet 2 inches long, $2\frac{1}{2}$ inches by $2\frac{1}{2}$, 4 feet out of ground, right bank Ste. Marie river, northwest corner; south 36 degrees 43 minutes west along right bank Ste. Marie river 2 chains 36 links to post on river bank; north 65 degrees west along right bank river 2 chains to post on river bank; south 30 degrees east along right bank river 1
25 chain 50 links to post on river bank; south $22\frac{3}{4}$ degrees west along right bank river 5 chains 90 links, post numbered $\frac{1}{3}$ cedar, 2 feet 7 inches long, 3 inches by $2\frac{1}{2}$ inches, 4 feet out of ground, southwest corner; south 88 degrees 50 minutes east along south boundary 10 chains to post $\frac{1}{3}$ cedar, 2 feet 9 inches long, $3\frac{1}{2}$ by $2\frac{3}{4}$ inches, 1 foot out of ground, to place of beginning, containing 6.42 acres.

Claim number 3, Peck and Newcomb.

Second part claim number 3 began at post number 1-7 cedar, 2 feet 5 inches long, $2\frac{3}{4}$ inches by $3\frac{1}{4}$ inches, 6 inches out of ground, north side of Ridge street and west side Meridian street, 50 links north 88 degrees 50 minutes west from a point on the principal meridian of Michigan, 8 chains 87 links north of quarter section post, east side section 1, town. 47 north, range 1 west; thence north along west side Meridian street 4 chains 22 links to post number 1-8 cedar, 2 feet 4 inches long, $3\frac{1}{4}$ by $3\frac{1}{2}$ inches, 5 inches out of ground, northeast corner, south side Canal street; south 85 degrees 23 minutes west along south side Canal street 3 chains 10 links to post number 1-9, white cedar, 2 feet 6 inches long, $2\frac{1}{2}$ inches by $3\frac{1}{2}$ inches, 6 inches out of ground, northwest corner, right bank River Ste. Marie; south 26 degrees 16 minutes west along right bank Ste. Marie, 4 chains 32 links to post number 1-6, white cedar, 2 feet 6 inches long, $2\frac{3}{4}$ by $3\frac{1}{2}$ inches, 5 inches out of ground, north side of Ridge street, southwest corner; south 88 degrees 50 minutes east along north side Ridge street 5 chains to post number 1-7, white cedar, 2 feet 5 inches long, $2\frac{3}{4}$ by $3\frac{1}{4}$ inches, 6 inches out of ground to place of beginning, containing acres 0.09.

Claim number 3, Peck and Newcomb.

Third part claim number 3 began at post number 1-3-3,
26 white cedar, 2 feet 3 inches long, 3 by 4 inches, 11 inches out of ground, standing at the intersection of the northerly boundary of the canal reservation and the principal meridian of Michigan, 20 chains and 22 links north from the quarter-section post, east side section 1, township 47 north, range 1 west; thence north along the meridian to right bank River Ste. Marie 90 chains to post numbered 1-3-5, white cedar, 2 feet 7 inches long, 3 inches by $2\frac{1}{2}$ inches, whole spiked on east side of Morning Star house; south 61 degrees 43 minutes west along right bank of River Ste. Marie 2 chains 24 links to post numbered 1-3-4, white cedar, 2 feet 5 inches long, 3 inches by $3\frac{1}{2}$ inches, 2 inches out of ground,

southwest corner; north 85 degrees 23 minutes east along northerly boundary canal reservation 1 chain 98 links to post numbered 1-3-3, white cedar, 2 feet 3 inches long, 3 inches by 4 inches, 11 inches out of ground, to place beginning, containing acres 0.09.

Claim number 3, Peck and Newcomb.

Fourth part claim number 3 began at post number 1-3-3, white cedar, 2 feet 3 inches long, 3 inches by 4 inches, 11 inches out of ground, standing at the intersection of the northerly boundary of the canal reservation and the principal meridian of Michigan, 20 chains and 20 links north from the quarter-section post, west side section 6, town. 47 north, range 1 east; thence north 85 degrees 23 minutes east, along the northerly boundary canal reservation, 9 chains 17 links to post number 1-3-6, white cedar, 2 feet 6 inches long, 2 inches by 2½ inches, 1 foot 4 inches out of ground, northeast corner; north 89 degrees west along the north boundary of claim number 3, 9 chains 17 links to post number 1-3-5, white cedar, 2 feet 7 inches long, 3 inches by 2½ inches, whole spiked on east side of the Morning Star Grocery house, at intersection of meridian and right bank of River Ste. Marie; meridian north terminus; 27 south along the meridian 90 chains to post number 1-3-3, cedar, 2 feet 3 inches by 3 feet 4 inches, 11 inches out of ground, to place of beginning, containing $\frac{41}{100}$ acres.

Claim number 3, Peck and Newcomb.

Fifth part claim number 3 began at post number 2-3, white cedar, 2 feet 5 inches long, 3 by 3¼ inches, 1 foot 1 inch out of ground, north side Spruce street, link southwest corner and 50; south 88 degrees 50 minutes east of the quarter-section post on the principal meridian of Michigan, west side section 6, township 47 north, range 1 east; thence south 88 degrees 50 minutes east along north side Spruce street 8 chains 64 links to post number 2-4, white cedar, 2 feet 6 inches long, 2¼ by 3¼ inches, 1 foot out of ground, southeast corner; north along east side claim 3 to south side Ridge street 7 chains 87 links to post number 2-5, white cedar, 2 feet 7 inches long, 3 inches by 2¼ inches, 1 foot 3 inches out of ground, northeast corner; north 88 degrees 50 minutes west along south side Ridge street to east side Meridian street 8 chains 64 links to post number 2-2, white cedar, 2 feet 6 inches long, 3¼ by 3¼ inches, 9 inches out of ground, northwest corner; south along east side Meridian street 7 chains 87 links to post number 2-3, white cedar, 2 feet 5 inches long, 3 inches by 3¼ inches, 1 foot 1 inch out of ground, to place of beginning, containing 6.80 acres.

Claim number 3, Peck and Newcomb.

Sixth part claim number 3 began at post number 2-1, white cedar, 2 feet 3 inches long, 2½ inches by 2½ inches, 1 foot out of ground, north side Ridge street, southwest corner and 50 links; south 88 degrees 50 minutes east of a point on the principal meridian of

Michigan 8 chains 87 links north from the quarter-section post on the meridian, west side section 6, town. 47 north, range 1 east; thence south 88 degrees 50 minutes east along north side
28 Ridge street 8 chains and 64 links to a post number 2-6, white cedar, 2 feet 4 inches long, $2\frac{3}{4}$ by $3\frac{1}{4}$ inches, 1 foot out of ground, southeast corner; north along the east side claim 3 to south side Canal street 5 chains 18 links to post number 2-7, white cedar, 2 feet 4 inches long, $2\frac{1}{4}$ by $3\frac{1}{4}$ inches, 9 inches out of ground, northeast corner; north 85 degrees 23 minutes west along southerly side Canal street to east side Meridian street 8 chains 67 links to post number 2-0, white cedar, 2 feet 3 inches long, $2\frac{1}{2}$ inches by $2\frac{3}{4}$ inches, 8 inches out of ground. This post is set 24 links south 85 degrees 23 minutes west from the corner, on the west side of a house standing on the corner; south along the east side of Meridian street 4 chains 30 links to a post number 2-1, white cedar, 2 feet 3 inches long, $2\frac{1}{2}$ by $2\frac{1}{2}$ inches, 1 foot out of ground, to place of beginning, containing acres 4.095. Whole claim containing acres 19.45.

Bill of Exceptions.

At a session of the circuit court of the United States for the western district of Michigan, northern division, continued and held pursuant to adjournment, the 14th day of September, 1892.

Present: The Hon. Henry F. Severens, district judge.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

The above cause, being at issue, came on to be tried before the said district judge with a jury duly impaneled to try the same, and the plaintiff, to maintain the issue on his part, showed:
29 That the plaintiff was the owner in fee of the undivided half of private claim number three, in the village of Sault Ste. Marie, Chippewa county, Michigan, in said western district and northern division, according to the survey or plat of said village by Thomas Whelpley, made pursuant to the provisions of an act of Congress approved September 26th, 1850, and entitled, "An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan." A copy, said Whelpley survey, in part, is hereto annexed and marked Exhibit 9—line of new pier being since added.

The land in question was confirmed under the provisions of that act to the heirs of Franklin Newcomb and one Peck jointly, and plaintiff derived title by mesne conveyances from the heirs of Franklin Newcomb, by which he became the owner of the undivided half above referred to, prior to the construction of the pier by the United States Government, hereinafter stated, and plaintiff offered evidence tending to show that the undivided half of said land was worth the sum of six thousand dollars and upwards, which was disputed by the defense.

That the United States Government, through its officers, con-

structed what is called the new South pier, at the upper end of the Saint Mary's Falls ship canal, across the front of said private claim three, and within the boundaries of the riparian ownership of the plaintiff, as projected from the land towards the middle thread of the stream, as shown by the map or plat attached to and made a part of the deposition of Alfred Noble, which is hereinafter made a portion of this bill of exceptions.

The construction of the pier was commenced in 1877, and completed in 1881, and that the effect of the construction of the pier in question was to entirely exclude the plaintiff from all access from his land within the lateral lines of his riparian ownership,
30 projected as aforesaid, to the navigable water or to the channel of the river that was navigable, as shown by a plat or map thereof hereto attached and marked Exhibit 1. That on both sides of the space included within such projected lines of plaintiff's riparian ownership, and between the pier and the bank of the river, the water was only five feet in depth, so that by the construction of the pier and of the maintenance thereof, plaintiff is prevented from reaching navigable water of greater depth than five feet. That plaintiff attempted to land cargo on said pier, and thus convey it to his lot in question, but was prevented from doing so and driven off by the defendant, who claimed the exclusive right thereto for the United States.

That the defendant, Wheeler, was the superintendent of the canal, including this pier, employed by the United States, and in possession of it for and on behalf of the United States Government; that he was in such possession under such authority, and under such claim, prior to and at the time of the commencement of this suit, and continued so up to the time of the trial; that the said canal was originally constructed by the State of Michigan, through United States lands, and the location thereof and the right of way therefor were provided by an act of Congress approved August 26th, 1852, entitled, "An act granting the State of Michigan the right of way, and the donation of public land for the construction of a ship canal around the falls of Saint Mary's, in said State;" and Exhibit 2 hereto attached is the plat of the survey of the line or route of said canal referred to in sections 1 and 6 of said act.

That Exhibit 3 hereto attached is a copy of the patent of said lands issued by the Government; that the confirmation of the claim of the patentees, under the act of September 26th, 1850, was made by the Commissioner of the Land Office, as provided therein, in 1855.

31 That Exhibits 4 and 5 hereto attached are plats or maps showing said private claim three, and the lateral boundary lines, as projected as aforesaid, of plaintiff's riparian ownership, and the location of the new pier, and also of the piers of the canal, as originally constructed, together with the boundaries of the canal right of way granted under the act of August 26th, 1852. That the possession of the defendant Wheeler for the United States was exclusive and adverse to the plaintiff.

The canal, as originally constructed, was begun in 1853 and com-

pleted in 1855, and the original pier, as built, extended across a portion of the front of private claim three, taking a turn to the northward into deep water, leaving, however, from three to four hundred feet of a gap, through which access to navigable water could be had from plaintiffs land; that the new pier does not follow the lines of the deep water; that the depth of the water on the land where the new South pier was built was about an average of five feet, and the whole space between where the old pier stood and the new pier was constructed had to be removed by excavation.

The rapids or falls began east of where plaintiff's eastern lateral line would strike deep water, as plaintiff claimed under the law; that the river proper in front of plaintiff's land and across his riparian front was naturally deep enough for navigation, and plaintiff's eastern lateral line, projected, reached to such deep water; that the pier or improvement in question was a part of the canal, and within the piers and between the piers as they now exist was an artificial channel, made in extension of and as a part of the canal, which was also an artificial channel, constructed through the land around the falls; that the survey and plat marked Exhibit 2 is the plat of the route of the old canal, as approved by the Secretary of War and finally selected by him.

32 At the request of the court the field-notes of Whelpley's survey of private claim three were introduced in evidence, and are hereto attached, marked Exhibit 6. That no map or plat showing any change in the route of the canal has been made or filed in any of the departments, with reference to the change from the old plan or route to the new one, except the plans submitted by the United States engineers to the Secretary of War, as hereinafter stated.

That before the construction of said new pier, the same was recommended by the corps of engineers to the Secretary of War, with an accompanying map, a copy of which is annexed, marked Exhibit "A," and the specific work was by him approved, and said pier constructed in accordance therewith; said recommendation and approval were in accordance with the usual way of carrying on public work for the United States Government.

In 1881 the State of Michigan transferred all rights to the canal to the United States. That the South pier, as it now stands, and where it crosses in front of plaintiff's land, is more than two hundred feet from the center line of the right of way granted by the act of August 26th, 1852, as fixed by Exhibit 2:

Provided under the terms of said act, said center line after it crosses the meander line of the river was to be drawn on a curve line conforming to the curve of the piers, as shown by the map of location approved by Secretary of War, 1853.

Counsel for defendant argued that the center line of the grant was not definitely located by the map, and established beyond the military reservation and under the waters of the river, and arguing further that said pier was constructed on a line parallel with the center line of the grant, if said center line extended in a straight

line westward from the meander line of the river and paral-
33 lel with said South pier, as constructed.

The court stated in its impression that the map did fix the old route of the canal, and they were bound by it unless the route was afterwards changed.

That said Saint Mary's river forms a part of the boundary line between the United States and Canada, and, where navigable, with the Great Lakes, forms a highway for interstate and international commerce. That at the falls near the point in question the said river was not navigable owing to the falls, and said canal was built around the same to connect the navigable parts of the river above and below, and is used in connection therewith for the purpose of interstate and international commerce.

The plaintiff then offered in evidence the deposition of ALFRED NOBLE, with the exhibit thereto attached, which is deemed especially important by counsel for plaintiff, and at their request is here inserted in full, as follows:

Intr. 1. What is your name, age, residence and occupation?

Ans. My name is Alfred Noble; I am 48 years of age and reside in Memphis, Tennessee. By occupation I am a civil engineer.

Intr. 3. Your present work is what?

Ans. I am resident engineer of the Memphis bridge.

Intr. 4. State if at any time you were acting in a professional character for the Government.

Ans. Yes, sir; been employed as such from May, 1868, until 1892.

Intr. 5. What public work were you engaged on during the year 1887?

Ans. Saint Mary's Falls canal.

Intr. 6. Between what points does that canal extend?

Ans. It extends in the Saint Mary's river at Sault Ste. Marie.

34 Intr. 7. What is the nature of that work?

Ans. It is a ship canal. It is for the passage of vessels from Lake Huron to Lake Superior.

Intr. 8. What work in connection with that canal or waterway extends beyond the water's edge westerly?

Ans. There is a pier extending into Saint Mary's river at the western entrance of the canal on the south side.

Intr. 9. What on the north?

Ans. A shorter pier.

Intr. 10. Now, with special reference to what you designate as the pier on the south side, I show you, Mr. Noble, a blue print or map by Mr. J. B. Davis, of Ann Arbor, Michigan; now, will you state whether that map is, as you understand it, a strictly substantial illustration of that pier, its location, and that portion of the canal immediately adjacent to it?

Ans. It is substantially correct.

Intr. 11. Do you know Mr. Davis?

Ans. Yes, sir.

Intr. 12. What is his profession?

Ans. A civil engineer by profession, and assistant in the University of Michigan. I have known him since 1867.

Intr. 13. Under whose supervision was that South pier built?

Ans. It was built under my own supervision, as assistant engineer in charge.

Intr. 14. Who was the chief engineer?

Ans. Gen. Godfrey Weitzel.

Intr. 15. I call your attention to some lines, dotted lines, and other lines to be found between what is designated on the map as the North pier, 1891, and the South pier, 1891. What do you say with reference to these lines and paragraphs marked "South pier as built and North pier as built"?

35 Ans. So far as I can judge, they represent correctly the location of the North and South piers in 1870.

Intr. 16. That is, you mean the piers that were constructed when the canal was first built?

Ans. Not necessarily. The map represents the South pier when built, or when the canal was first constructed, and the North pier was afterwards extended.

Intr. 17. Does the map, so far as those two piers are concerned, represent substantially the piers as they were when you went there in charge of the work?

Ans. I should say, as to the North pier, it was nearly or quite to the extent shown on this map.

Intr. 18. How as to the South pier?

Ans. The South pier, marked on the map "the South pier as built," represented the work at that time, or the condition and location of the pier when I went there, as nearly as I can tell from the map.

Intr. 19. What was the general nature of the improvements? What under your supervision in reference to the canal?

Ans. The construction of the new lock and the straightening of the south bank of the canal at the west end.

Intr. 20. And was the cut, or channel, a part of the lock proper, and that was deepened. Was it widened?

Ans. Yes, sir, it was widened nearly the whole length from the upper end of the lock to the head of the canal. I mean the west end of the lock.

Intr. 21. What became of the old pier?

Ans. The North pier remained without change, and the South pier was removed, and the upper pier made straight.

Intr. 22. That is, the south side of the west end of the canal was made straight?

Ans. Yes, sir.

Intr. 23. By whom—or, I should have said, how?

Ans. Partially by excavating the lock within the coffer

36 dam, and the building of the piers.

Intr. 24. Will you explain in your own way just the character and the extent of that work so far as the straightening of the

south side, and the construction of the South pier, and the dredging?

Ans. The depth of the water along the line afterwards occupied by the South pier began from nothing at the shore line to about sixteen feet at the extreme west end, and for the greater part of the distance was not over five or six feet deep.

Intr. 25. What was the nature of the bottom?

Ans. It was sand, so far as we could see; from an inspection of the bottom we found a large number of boulders, and at the east end of the work found a bed of rocks.

Intr. 26. How far to the northward of the South pier, as straightened out, did that shoal water extend, five or six feet?

Ans. The limit of the depth of five feet of water, as nearly as I can recollect, was very nearly a straight line drawn from the southwest corner of the old South pier to a point on the north face of the new South pier about two hundred feet east from the west end of the pier.

Intr. 27. And so, between that line so drawn and where the new South pier, so called, was located, shoal water, a depth of about five feet?

Ans. Yes, sir.

Intr. 28. Coming south of that pier, between the South pier and the shore line, what was the nature of the bottom, if you remember, and the depth of the water?

Ans. The depth gradually diminished towards the shore and the bottom was generally sandy, with perhaps some boulders at the southern limit.

Intr. 29. How did you build that South pier? What work,
37 if anything, did you have to do to prepare for the construction of it?

Ans. The side of the pier was first dredged to a depth of about sixteen feet, the full width, or a little more than the full width, of the proposed pier.

Intr. 30. What is the length of the pier from the point where it leaves the water's edge?

Ans. It is about eighteen hundred feet from the water's edge, before the work was commenced.

Intr. 31. How far does it extend beyond the extreme western point of the old pier—the old South pier, so called?

Ans. It appears to be about twelve hundred feet.

Intr. 32. What was the depth of the water between the old South pier and the line of the new pier?

Ans. It was about five feet at or opposite the outer end of the old South pier, and diminished.

Intr. 33. At what point, with reference to the shore line, does the new South pier begin to diverge from the course or line of the old pier?

Ans. It diverges from the original south bank of the canal, about four hundred and fifty feet east of the original shore line.

Intr. 34. That is, the south wall of the canal, of which the South

pier is an extension, begins to diverge from the old wall of the canal about four hundred and fifty feet from the shore line?

Ans. Yes, sir.

Intr. 35. What was the depth of the water in the old channel; that is, the old channel at the time that you began the construction of the new one?

Ans. About twelve feet.

Intr. 36. Was that the depth of the water between the old piers?

Ans. Substantially so. The water was a little deeper along the outer end of the North pier.

38 Intr. 37. Is it not a fact, Mr. Noble, that the old piers extended or were constructed out to the channel where the natural depth of the water was about twelve feet?

Ans. I don't know as to that; my recollection is different from that.

Intr. 38. Now, from looking at this map, and assuming the drawing made there as to the old pier to be substantially correct, what was the general direction of those piers?

Ans. A little northwest.

Intr. 39. Assuming the same, what is the general direction of the South pier as constructed under your supervision?

Ans. A little south of west.

Intr. 40. What do you say as to that being or not being a material change in the direction of the canal at that point?

Ans. It was a material change at the west end of the canal.

Intr. 41. Now, assuming again Mr. Davis' drawing to be correct, what is the distance between the western end of the South pier, as built, or the old South pier or the point directly opposite of the new South pier?

Ans. Three hundred feet.

Intr. 42. What is the distance from the western end of the old South pier, as built, and the line of the old North pier?

Ans. Two hundred feet.

Intr. 43. When did you begin the construction of this new South pier?

Ans. We began the construction during the year ending June 30th, 1878.

Intr. 44. What was the first work done?

Ans. Dredging for the site of the pier.

Intr. 45. Where was the first dredging done?

39 Ans. I couldn't say at this time, exactly.

Intr. 46. Is there anything in any of your records to indicate that?

Ans. No, sir, not for the pier.

Intr. 47. What portion of the pier was first put in?

Ans. That I don't remember definitely.

Intr. 48. By looking at one of your reports at the close of the year, June 30th, 1878, I find that one thousand and seventy feet of crib-work had been placed, and the west end was built two hundred and fifty feet east of the west end of the work, as finally completed.

Now, how near did they come to being on a line with the west end of the old South pier?

Ans. The east end of that work was about one hundred and fifty feet east of the old South pier, east of the west end of the old South pier.

Intr. 49. How long was it from the time that you began the construction in the manner indicated until the pier was constructed and the superstructure and all of this dredging north of the South pier completed?

Ans. If I remember correctly, the work was entirely finished in 1881.

Intr. 50. By what authority were you acting as assistant engineer in charge of the improvement at Sault Ste. Marie?

Ans. Gen. Godfrey Weitzel's. He was of the corps of the United States Army.

Intr. 51. For whom was this work being done, and under whose authority was it being constructed?

Ans. Gen. Weitzel was a member of the corps of engineers, and was acting under the orders of the United States Government.

Intr. 52. And the improvement of the canal and this work that you have been testifying about was for the Federal Government?

40 Ans. It was, to my knowledge.

Intr. 53. Did you hold any official position in connection with the operation of the canal?

Ans. I was general superintendent of the canal.

Intr. 54. Until what time?

Ans. Until 1882. From the time that the canal was transferred by the State of Michigan to the United States, I think in 1881, until August, 1882.

Intr. 55. You speak of the canal being transferred by Michigan to the Government. The State had nothing to do with this work that you know of?

Ans. Nothing whatever.

Intr. 56. I will call your attention again to the map and to a line drawn from the shore in a northwesterly direction and designated as "Riparian boundary to twelve curve, as per Michigan reports." State how far that line is from the western end of the old South pier, as built, where it would intersect that pier if extended, or if the pier were extended.

Ans. That question is a little difficult to answer.

Intr. 57. Suppose the pier to be extended in a straight line from, or suppose it were extended in the same direction as the new South pier?

Ans. Assuming the map to be correct, the distance would be about two hundred and eighty feet.

Intr. 58. Have you ever had occasion to look at the map filed in the office of the War Department, and also the Land Commissioner's office, showing the survey?

Ans. Yes, sir.

Intr. 59. How long since you saw it?

Ans. At least ten years.

Intr. 60. Do you remember whether there was any substantial variation between the plat as laid down on that map and the actual construction of the old piers?

Ans. I do not.

41 Intr. 61. You never looked into that?

Ans. No, sir; I never looked into that.

Intr. 62. How did you come to go on this land to build that pier?

Ans. I don't remember now that the question of private ownership ever occurred to us. I will say that I don't remember that it ever occurred to us before we began to work. I think Mr. M. W. Scranton remarked about it, or referred to it.

Intr. 63. Who is he?

Ans. The father of the plaintiff in this case.

Intr. 64. So far as you had anything to do with it, did you ever acquire any right from Mr. Scranton, or any one owning that land, to build the pier for the Government?

Ans. Never did.

Intr. 65. Do you remember how long after they began the work of extending that South pier out when Mr. Scranton mentioned the difficulty?

Ans. I do not.

Intr. 66. Looking at the map again, Mr. Noble, I will call your attention to a line marked "Whelpley," 1854 and 1855. Now, assuming that to be substantially correct, how far from that shore line is the easterly end of the pier?

Ans. The distance from the intersection of the South pier with the line marked "Present (1891) shore line" to the point marked "New South pier" intersects the old south bank of the canal, or the shore, is about five hundred feet, assuming the map to be correct.

Intr. 67. How permanent is that pier?

Ans. A portion of the timber is above low water and will have to be rebuilt in five, six or eight years.

Intr. 68. How effectually does it shut off approach from that part of the shore marked "Southwest part, private claim No. 3,"

42 within the boundaries as laid down on the map, to the channel or deep water?

Ans. It crosses the land described.

Intr. 69. Completely?

Ans. Yes, sir.

Intr. 70. So that there is no way of obtaining access to private claim No. 3, that I have mentioned within the riparian deep water as laid down on the map, except by crossing the pier?

Ans. No, sir.

Intr. 71. The space between the South pier, as originally built, and the South pier as constructed under your supervision in 1881, was used for what purpose?

Ans. It has been dredged and excavated to the depth of sixteen feet and forms part of the canal channel.

Intr. 72. And was in the possession of the United States when you were there?

Ans. Yes, sir.

Intr. 73. Referring to the question of excavating, you used that term to distinguish from the term "dredging and rock-work"?

Ans. Yes, sir.

Intr. 74. Will you explain the method adopted and followed in that excavation between the riparian boundaries there? I think one of your records shows that.

Ans. I don't know whether it shows the coffer dam or not. I am pretty certain that within the area described the material was all removed by dredging between the riparian lines.

Intr. 75. What portion of the work was done by rock excavation, rendered possible by the building of the coffer dam?

Ans. It would be approximately the area, or over the area, bounded by the south line of the new South pier to the north line of
43 the old South pier and the eastern boundary of the claim to which you have referred, or claim No. 3.

Intr. 76. What was the necessity for building a coffer dam? Wasn't this substantial land that was taken away or excavated there?

Ans. The building of the coffer dam was necessary to remove the rock and shut the water out so that the men could work in the excavation.

Intr. 77. Within that area excavated in the manner that you have just spoken of, what portion was under water?

Ans. I couldn't give the proportion with any degree of accuracy. Some portions were covered with water and other portions were above water.

Intr. 78. Is it not true, also, that that pier constructed and called "South pier" and a portion of that excavation was not under water? Didn't you extend the foundation for the pier into the land somewhat?

Ans. Yes, sir.

Intr. 79. Were you familiar with the general course of the stream there?

Ans. Yes, sir, I was.

Intr. 80. About what was the general course of the stream there?

Ans. It was nearly southwest and northeast.

Intr. 81. Now, looking at the map again, and at a line designated as the "Twelve-foot curve, U. S. chart," commencing at the outer edge of the map and running to the west end of the new South pier, and taking that along then to the southern, and again crossing the South pier in a northern direction, what do you say as to that portion of the line that extends between the points where it crosses the South pier to the point where it crosses the North pier as conforming substantially to the general course of the stream there?

44 Counsel for defendant objects to the question on the ground that it has not been shown that any survey has been made that determines the correctness of the map in question here,

or that the trend of the stream in question has been ascertained in survey or measurement, and that the testimony proposed for that reason is incompetent.

Ans. I can say in a general way that the course is pretty close to the direction of the stream.

Cross-examination.

By LEWIS G. PALMER, counsel for defendant:

Intr. 1. You have no particular knowledge, have you, of the direct authority or commission under which Gen. Weitzel acted on that work, except in a general way that he represented the Government?

Ans. I have seen the correspondence of Gen. Weitzel.

Intr. 2. And you were acting under him?

Ans. Yes, sir.

Intr. 3. Subject to his orders and no other orders?

Ans. Under his orders, and no other orders.

Intr. 4. Now, had you any other knowledge except that the father of the plaintiff in this case may have mentioned the matter to you, that you were interfering with any private claim in building this pier, or interfering with riparian rights?

Ans. Not to the best of my recollection.

Intr. 5. What effort, if any, was ever made by the plaintiff, or any one on his behalf, to stop the progress of this work, from the time that it began until it was completed?

Objected to by counsel for the plaintiff as incompetent

Ans. I know of no effort of the kind.

Intr. 6. Are you acquainted with the plaintiff in this case, Gilmore G. Scranton?

Ans. Yes, sir.

45 Intr. 7. Did you know him during the progress of this work?

Ans. Yes, sir.

Intr. 8. Did he reside at Sault Ste. Marie?

Ans. Yes, sir; he was a minor at that time and I met him with his father.

Intr. 9. Did you ever notice any perceptible difference in the depth of the water before and after the building of this pier?

Ans. I never noticed any difference; in fact, I know nothing about it.

Intr. 10. What is the depth of the water at the west end of the new South pier?

Ans. It was about sixteen feet.

Intr. 11. And gradually diminished from there to the shore?

Ans. Diminished quite rapidly in going from the pier to the shore, or it diminished quite rapidly for a short distance. In going from the pier to the shore it diminished in any direction.

Intr. 12. How deep from the shore line was the water that is

marked "Whelpley, 1854 and 1855," from riparian boundary? State whether it deepens there very abruptly or gradually for some distance.

Ans. It was somewhere from three to five feet from where the boundary intercepts.

Intr. 13. Before the building of this pier, this new South pier, how near to the shore line just referred to could boats of any size approach? Could all boats drawing six, seven or eight feet of water get near to your pier where you had constructed up to the line marked "Riparian boundary"?

Ans. A boat of that draft could not have reached the South pier.

Intr. 14. In what manner, if at all, did the building of
46 this pier interfere with or obstruct access to the shore line marked "Whelpley 1854," or the private claim, the claim of Mr. Scranton, interfere in any way with navigation?

Ans. Navigation at that time was carried on with vessels exceeding six feet of draft, and in that case it would not be apt to get even with the line of the pier.

Redirect examination.

By J. C. DONNELLY, counsel for plaintiff:

Intr. 1. How far does it interfere with the 12-foot line, and going from the 12-foot line or the upland shore?

Ans. The pier closes communication by vessels.

Intr. 2. Doesn't it also prevent the construction of docks and the use of the water front and the channel bank and the deep-water line? I mean the original deep-water line.

Ans. A dock or pier built in that locality would be an obstruction to the canal, and it could not exist.

Intr. 3. So that the Government, after you finished the construction of the South pier and the entire improvements in that neighborhood, in cutting the dredging from the South pier out to the twelve-foot or sixteen-foot land, so called, was in actual possession of the entire front, or riparian front, and was using it for that pier and the canal?

Counsel for defendant objects to the question upon the ground that it is incompetent.

Ans. The area described was in constant use by vessels entering and leaving the canal.

Intr. 4. Could it have been used for that purpose unless the Government had taken possession?

Counsel for defendant objects to the question upon the ground that it is incompetent and irrelevant and immaterial.

47 Ans. No, it could not.

Intr. 5. So that, Mr. Noble, this improvement, including the construction of the South pier and the dredging out to the depth necessary and to conform with the depth in the canal, is in sub-

stance and fact an artificial channel by the Government under your supervision?

Ans. Yes, sir.

Intr. 6. That is so between the South pier and the 12-foot land to which we have called attention, is it not?

Ans. Yes, sir, assuming the map to be correct.

Intr. 7. Without regard to the map at all, simply from your knowledge of the work, that channel is substantially an artificial one?

Ans. Yes, sir, within the limit described.

Intr. 8. If a man owned private claim 3 and desired to build a dock or wharf, as he claimed he had a right under the law, at the channel bank, or at the deep-water line, or navigable-water line, so called, assuming twelve feet in the present case to be the channel bank, how could he do it after you had put in that pier and made that dredging, without planting it in the middle of that artificial channel which you have constructed?

Objected to by counsel for defendant on the ground that it is incompetent and immaterial.

Ans. It wouldn't be possible to do it without being in the artificial channel.

Intr. 9. The result of that is that if the owner of lot 3 is deprived from any cause of the use of the riparian front, isn't the effect of it, or the whole construction, to deprive him entirely of his water front?

Objected to by counsel for defendant because it is incompetent and immaterial.

Ans. So far as I can see that is a legal question rather than a fact.

48 Intr. 10. Referring to the question of Gen. Weitzel's authority, you were called upon from time to time to make reports of your work?

Ans. Yes, sir.

Intr. 11. In what form were those reports made?

Ans. In writing.

Intr. 12. They were written reports and submitted to Gen. Weitzel as the officer in charge?

Ans. Yes, sir.

Intr. 13. How frequently were you required to make those reports?

Ans. There was an annual report, which described briefly the progress of the work during the year.

Intr. 14. To whom were they made?

Ans. To Gen. Weitzel.

Intr. 15. Are you familiar with the ultimate destination of those reports?

Objected to by counsel for defendant as incompetent and irrelevant.

Ans. The reports were in substance a part in Gen. Weitzel's records as chief engineer of the United States Army.

Intr. 16. Who was chief engineer of the United States Army at that time?

Ans. I do not now remember, but I think it was Gen. Humphries.

Intr. 17. Did the chief engineer of the United States Army publish an annual report of the work done under that department?

Ans. They were published by the Government.

Intr. 18. From an examination of the volumes of some of the reports do you find that any of your reports are embodied in them?

Ans. Yes, sir.

Intr. 19. What volumes have you before you?

49 Ans. Report for year ending June 30th, 1870, and report for year ending June 30th, 1878, and report for year ending June 30th, 1880.

Intr. 20. In those volumes do you find some of your reports?

Ans. Yes, sir.

Intr. 21. Designate the pages, and state whether there are any maps and charts accompanying your reports, and whether you recognize them as maps and charts attached to your reports.

Ans. On pages 922, 923, 924 of the reports for 1870, and the pages following 924, and on page 1219, a report for 1878, and the pages preceding that page, and on page 2070 and 2071 of the report for 1880, and page 2068.

Intr. 22. Is it not a fact, Mr. Noble, that it was well understood by Gen. Weitzel and other officers connected with the improvement that in the construction of that South pier there was a serious question?

Objected to on the ground that it is incompetent and irrelevant.

Ans. I am not certain that the matter was ever brought before Gen. Weitzel.

Intr. 23. Was there any question made or brought before any one else?

Ans. I remember nothing about it, except that once Mr. Scranton mentioned it to me.

Intr. 24. In connection with the extension of the South pier, did you refer at all to the original map or plat, fixing the right of way to the canal, as was filed in the War Department?

Objected to by counsel for defendant as incompetent and irrelevant.

Ans. Not to my knowledge.

Intr. 25. Who was the contractor for the dredging?

Ans. C. S. Barker.

50 Intr. 26. Who paid it?

Objected to by counsel for defendant as incompetent, irrelevant and immaterial.

Ans. I have no personal knowledge of the payments.

Intr. 27. You didn't do the disbursing?

Ans. No, sir.

Intr. 28. Did Barker do the work under contract?

Ans. Yes, sir.

Intr. 29. Did that include the dredging for the construction of the pier?

Objected to by counsel for defendant as incompetent and irrelevant, as the witness does not pretend to know the nature of the contract, and is objected to because the contract is not shown to be in evidence, it being in writing is therefore the best evidence of what it contains.

Intr. 30. With whom did he have the contract?

Ans. I don't recollect the exact form of the contract. It was for the United States.

Intr. 31. How did you, or from whom did you draw your pay?

Objected to by counsel for defendant as immaterial.

Ans. From Gen. Weitzel.

Intr. 32. Was Gen. Weitzel disbursing officer?

Ans. Yes, sir.

Intr. 33. Were you paid by draft on the Treasury?

Ans. I was paid by a check on the Second National bank.

Further sayeth not.

A map designated "Upper end Saint Mary's Falls canal and part of private claim 3, in section 1, T. 47 N., R. 1 W., Michigan, 1891 and 1892," is offered in evidence by counsel for plaintiff, and the counsel for defendant objects to the map being offered in evi-
51 dence because the map is not offered and is not the original survey, and it is incompetent for that reason.

(Signed) ALFRED NOBLE.

Subscribed and sworn to before me, at Memphis, Tennessee, on this 14th day of April, A. D. 1892, by the said Alfred Noble, as stated in the caption hereof, and after the said witness had read over the same. By agreement of counsel named in the caption hereof, no further certificate is made to this deposition.

JOHN B. CLOUGH,
Commissioner, etc.

The map above mentioned, called the J. B. Davis map, 1891–'92, is hereto attached, and is marked Exhibit No. 10.

Plaintiff then offered in evidence Exhibits 7 and 8, being certified copies of lake-survey maps, hereto attached and made a part of this bill of exceptions.

Both parties then rested.

And thereupon the court directed a verdict in favor of the defendant, holding that the act of the Government in taking possession of the land claimed by the plaintiff and the construction of the

pier in question was a lawful exercise of its authority for the improvement of navigable rivers.

The opinion of the court was stated as follows:

By the COURT:

There are three leading questions in this case, the first of which, *i. e.*, whether the plaintiff could maintain this action against the defendant, who is a mere nominal party, and in a case where the substantial defendant is the United States, is one which appears to be settled by the decisions of the Supreme Court of the United States, and has already been ruled upon by me in the progress of the trial; it is not necessary, therefore, to say anything more about that now.

52 The second question arises upon the effect of the confirmation of this claim under the act of 1850. The question there presented is whether the effect of a grant which is bounded by a line, which is traced along the bank of a stream, conveyed to the grantee on the shore the riparian right to the water under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land to the center of the stream.

It is contended by the counsel for the plaintiff in this case that in determining this question—in determining the question of the right of this plaintiff to the land under the water to the center of the stream, the court is controlled by the law of the State of Michigan, and this court is bound to, at least ought to, follow the local law as declared by the highest tribunal of the State, as to what that right is, and in this case I agree with the counsel for the plaintiff. And I think that whatever might be the ruling of the Federal Court upon this question, if it were one of first impression and had not already been adjudicated by the tribunals of the State, if the doctrine is found to be settled by the tribunals of the State of Michigan, this court must follow the law as there declared. It is altogether clear from the decisions of the supreme court of Michigan that in case of a grant to a stream, without limiting it to the boundary of the stream, or in language equivalent to that, the owner of the land upon the bank owns the land to the middle file of the stream, subject to certain paramount rights, which I shall presently speak of. It also appears to be held by the case which has been cited by counsel for the plaintiff that the same consequence follows the grant of land where the boundary is drawn by the terms of the grant from point to point, and along the bank of the stream. Conceding this to be the doctrine, and that the rule is substantially the same in that regard whether the boundary is by a stream

53 generally or some equivalent description, that is, by a line drawn on the bank of the stream, the fact remains that the terms of such grants, as in every case, are to be construed in the light of the surrounding circumstances in which the grant is made and to which the parties must be supposed to have referred, or at least to have had cognizance and to have intended the construction of

the instrument to be in conformity to the surrounding circumstances, the existing facts in which the grant is made.

This is a law of uniform application in the construction of grants, as well as in the consideration of all forms of contracts, where any question may arise with respect to the construction or effect of stipulations in grants and contracts, and indeed the same rule applies in consideration of the statutes of the legislature. Now, in this case it appears that at the time when these proceedings were going forward for the confirmation of these land claims, that the General Government, co-operating with the State, was contemplating entering upon the construction of an important public work at this point. This ship canal was a great enterprise, and the proceedings were for the purpose of its construction as a means for interstate and international commerce. Proceedings had already been inaugurated in this plan before the confirmation of the Whelpley plat; the line of this canal had been traced, the center established and the grant to the State of Michigan had been drawn, and this act of Congress had been passed, making this very extensive donation to the State for the purpose of aiding in making this construction of the canal. And it appears that by looking at that map—the Canfield map—looking at the location of the contemplated canal as it was at the start, that it ran in front of the land; that is, it ran along the front of the land which would be included within the lateral lines drawn through the corners of lot 3; and if effect
54 was to be given to this confirmation as to lot 3, so as to carry the ownership of lot 3 out to the thread of the stream, it would run directly into these public works, which were being carried forward at that time.

It does not appear in this case whether there were any other lands that were within the scope of that act, which were along the bank of this river at that point. It is sufficient to say, such is my strong impression, that to hold that the intention of the Government by the confirmation of this plat was to convey the title of these lands within the parallel lines extending from the shore to the thread of the stream, would be in effect giving to this plaintiff, or the person under whom he claims, the title to the bed on which these works were constructed. It can hardly be supposed that such consequences as this were intended by this grant, and my strong impression would be that the situation at that time, had the Government undertaken what these parties claim, was this: The parties who claimed a grant of lot 3, and to whom it was confirmed, knew it had been undertaken, and knew it was not understood by the Government on the one hand, or those representing it, and the grantee or confirmee on the other hand, that the effect of this confirmation of lot 3 would be to secure the title to this land out to and under these public works, and it would be my impression that that very significant and important circumstance would be enough to show that it was not the intention of the parties to this confirmation proceeding that riparian rights of such consequences were to be included within the scope of the confirmation. But, as I said, I do not find it necessary to make the case turn upon this point, because upon the other large

question which has been presented, I am of the opinion that the plaintiff in this case must fail.

If it be conceded that the ownership of the plaintiff, or those under whom he claims, extended to the middle of the stream,
55 within the parallel lines, still that ownership of the land under water is subject to important qualifications; those qualifications arise out of the public interest and requirements.

As I stated this morning, it was originally contemplated by the laws provided for the survey and sale of the lands in the Northwest that navigable streams should be and remain public highways. The effect of that, coupled with the power of Congress over the subject of commerce, is to create the qualification to which I have referred. There should also be taken into consideration public rights arising out of the general principles of law in their application to public waters. Now, the right of the plaintiff, in my opinion, if he has rights to the thread of the stream, is subordinate to the exercise and authority of Congress in improving the use of these public streams for the uses of commerce, and there could hardly, to my mind, be made improvements in the uses of public waters for the purposes of commerce of greater utility than was this improvement and enterprise in the construction of the canal around the falls of Sault Ste. Marie. It is well known that it is a very important avenue of commerce, and a commerce constantly increasing. There are but few streams in the world through which more extensive commerce goes than through that canal.

Now, it does not seem to me it is any more an invasion of private right than to build a light-house, if that is required, for the purposes of navigation, and within the water—not upon the hard land—there is a very clear distinction between the rights of the party to the land, that is, *terra firma*, and land under water, but to build light-houses which are important and necessary aids to commerce within the limits of the water, and where the adjacent proprietor has only this subordinate right which I have mentioned, and
56 that Congress should authorize the construction of a pier or a canal within the limits of these waters, is also, in my opinion, a proper and competent exercise of the jurisdiction of Congress over this subject.

In this case it does not appear that the plaintiff, or any one under whom he claims, prior to the occupation of this part of the stream for the purposes of building this pier, ever occupied it, ever built any erections there; no wharfs have ever been constructed there, so far as it appears, or at least prior to the time this pier was constructed. I think there is some distinction to be taken between the case where the adjacent proprietor has gone on and expended money in building docks and wharfs along the bank of a stream, and then the public authorities propose to exercise the public right over the stream by removing the erections of the adjacent proprietor, and a case where the public authorities exercise their jurisdiction and authority before any erections have been made; but whether that be a sound distinction or not, I am of the opinion that it is competent for the General Government, within the water lines—lines of

the current of the river—at any rate where the water is as deep as it appears to us to have been in this locality—five feet, I think the record shows—that the adjacent proprietor has no right to complain. It is the exercise of the paramount authority which he must have been deemed to contemplate, and which passed as an impression upon the title which he had to the thread of the stream, if he had one, and that the authority to build light-houses and to build piers rests upon the same substantial ground as the right to dredge out the bottom of the stream on the side of the middle toward the adjacent proprietor.

If these erections were necessary to the prosecution of a public work in the interest of commerce, and this authority was ex-
57 ercised within the current of the stream, with the water of the depth that it was here, I am satisfied that there is no invasion of any private right, and for these reasons I must hold that the plaintiff in this case is not entitled to recover.

To the jury: Gentlemen of the jury, for the reasons which I have just explained, the court is of the opinion that upon the facts, as they are conceded to be in this case, the plaintiff cannot recover.

It therefore becomes the duty of the court to instruct you that your verdict should be for the defendant.

Thereupon counsel for plaintiff excepted to the charge of the court in which the jury were instructed that under the laws providing for the survey and sale of lands in the Northwest, navigable streams were and remain public highways.

And also the said plaintiff excepted to the charge of the said court directing a verdict for defendant.

And thereupon the jury rendered a verdict in favor of the defendant and against the plaintiff.

And because none of the exceptions so taken and made to the decisions and opinions of the district judge do appear upon the record of said trial, therefore, on the prayer of the said plaintiff, by his counsel, the district judge hath signed this bill of exceptions, which contains a substantial statement of all the evidence introduced on the trial of said cause, according to the statute in such case made and provided, this 24th day of January, 1893.

HENRY F. SEVERENS,
District Judge.

58 *Petition for Writ of Error.*

The Circuit Court of the United States for the Western District of Michigan, Northern Division.

GILMORE G. SCRANTON, Plaintiff,
vs.
EBEN S. WHEELER, Defendant.

To the judge of said court:

The petition of said Gilmore G. Scranton respectfully shows:

1. That he is the plaintiff in the above-entitled cause.
2. That the same was tried before a jury on the 14th day of Sep-

tember, 1892, and verdict and judgment rendered therein in favor of the defendant and against your petitioner.

3. That he desires to remove said cause by writ of error to the circuit court of appeal for the sixth judicial circuit, for review, and he herewith tenders a bond on appeal, as provided by the rules of the said court of appeal, together with assignment of errors hereto attached.

Therefore he prays that a writ of error may be allowed to remove said cause to said circuit court of appeal, as above stated.

GILMORE G. SCRANTON.

The writ of error above prayed for is hereby allowed.
January 24, 1893.

H. F. SEVERENS,
District Judge.

59 *Assignment of Errors.*

In the Circuit Court of the United States for the Western District of Michigan, Northern Division.

GILMORE G. SCRANTON
vs.
EBEN S. WHEELER.

And now comes the said plaintiff and says that the court erred on the trial of said cause, as follows:

1. In that portion of its charge to the jury as follows: The jury are instructed that under the laws providing for the survey and sale of lands in the Northwest, navigable streams were and remain public highways.

The jury are further instructed that there should also be taken into consideration public rights arising out of the general principles of law in the application to public waters. Now the right of the plaintiff, in my opinion, if he has rights to the thread of the stream, is subordinate to the exercise and authority of Congress, in improving the use of these public streams for the uses of commerce, and there could hardly to my mind be made improvements in the uses of public waters for the purposes of commerce of greater utility than was this improvement and enterprise in the construction of the canal around the falls of Sault Ste. Marie. It is well known that it is a very important avenue of commerce, and a commerce constantly increasing. There are but few streams in the world through which more extensive commerce goes than through that canal.

60 Now it does not seem to me it is any more an invasion of private right to build a light-house, if that is required for the purposes of navigation, and within the water, not upon the hard land, there is a very clear distinction between the rights of the party to the land, that is, *terra firma*, and land under water, but to build light-houses which are important and necessary aids to commerce within the limits of the water, and where the adjacent proprietor has only this subordinate right which I have mentioned,

and that Congress should construct a pier or a canal within the limits of these waters, is also in my opinion a proper and competent exercise of the jurisdiction of Congress over this subject.

Now in this case it does not appear that the plaintiff, or any one under whom he claims, prior to the occupation of this part of the stream for the purposes of building this pier, ever occupied it, ever built any erections there; no wharfs have ever been constructed there, so far as appears, or at least prior to the time this pier was constructed. I think there is some distinction to be taken between the case where the adjacent proprietor has gone on and expended money in building docks and wharfs along the bank of a stream, and then the public authorities propose to exercise the public right over the stream by removing the erections of the adjacent proprietor, and a case where the public authorities exercise their jurisdiction and authority before any erections have been made; but whether that be a sound distinction or not, I am of the opinion that it is competent for the General Government within the water lines—lines of the current of the river—at any rate where the water is as deep as it appears to us to have been in this locality, four or five feet I think the record shows, that the adjacent proprietor has no right to complain. It is the exercise of the paramount authority which he must have been deemed to contemplate, and which passed as an impression upon the title which he had to the thread
61 of the stream, if he had one, and that the authority to build light-houses, and to build piers, rests upon the same substantial ground as the right to dredge out the bottom of the stream on the side of the middle toward the adjacent proprietor.

If these erections were necessary to the prosecution of a public work in the interest of commerce, and this authority was exercised within the current of the stream, with the water of the depth that it was here, I am satisfied that there is no invasion of any private right, and for these reasons I must hold that the plaintiff in this case is not entitled to recover.

Gentlemen of the jury: For the above reason, the court is of the opinion that upon the facts as they are conceded to be in this case, the plaintiff cannot recover. It therefore becomes the duty of the court to instruct you that your verdict should be for the defendant.

2. In directing the jury to render a verdict in favor of the defendant and against the plaintiff.

HARLOW P. DAVOCK,
Attorney for Plaintiff in Error.

JOHN C. DONNELLY, *Of Counsel.*

Bond on Writ of Error.

Know all men by these presents, that we, Gilmore G. Scranton, as principal, and Philetus M. Church and Henriette A. Scranton, as sureties, are held and firmly bound unto Eben S. Wheeler in the full and just sum of five hundred dollars, to be paid to the said Eben S. Wheeler, his certain attorneys, executors, administrators,

or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

62 Sealed with our seals and dated this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a session of the circuit court of the United States for the western district of Michigan, northern division, in a suit pending in said court between Gilmore G. Scranton, as plaintiff, and Eben S. Wheeler, as defendant, upon the 14th day of September, A. D. 1892, a judgment was rendered against the said Gilmore G. Scranton, and the said Gilmore G. Scranton having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Eben S. Wheeler, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the sixth day of February next.

Now, the condition of the above obligation is such, that if the said Gilmore G. Scranton shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GILMORE G. SCRANTON. [SEAL.]
PHILETUS M. CHURCH. [SEAL.]
HENRIETTE A. SCRANTON. [SEAL.]

Sealed and delivered in presence of—
JNO. A. COLWELL.
JOHN H. MORE.

The foregoing bond is hereby approved in form and substance, including the sufficiency of the sureties, this 24th day of January, 1893.

H. F. SEVERENS.
District Judge.

63 *Citation.*

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

United States Circuit Court of Appeals for the Sixth Circuit.

To Eben S. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the sixth day of February next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Michigan, northern division, wherein Gilmore G. Scranton is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said

plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred*th* and seventeenth.

H. F. SEVERENS,
District Judge.

I hereby acknowledge service of the within citation this 24th day of January, 1893.

J. B. McMAHON,
Ass't U. S. Att'y.

64 *Writ of Error.*

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Michigan, northern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Gilmore G. Scranton, as plaintiff, and Eben S. Wheeler, as defendant, a manifest error hath happened, to the great damage of the said Gilmore G. Scranton, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the sixth day of February next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our
65 Lord one thousand eight hundred and ninety-three, and of the Independence of the United States of America the one hundred and seventeenth.

[SEAL.] CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by—
H. F. SEVERENS,
District Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Western District of Michigan, Northern Division, } *ss:*

I, Francis M. Moore, deputy clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify the annexed and foregoing to be the original transcript received by me from the circuit court of Chippewa county, Michigan, in the cause therein entitled. Also the original bill of exceptions and original exhibits number one (1), two (2), four (4), five (5), seven (7), eight (8), nine (9) and ten (10), also petition for writ of error, assignments of error, bond on appeal, citation with acknowledgment of service and writ of error. Also copies of stipulation to amend *narr.*, amended *narr.*, journal entries for trial, verdict and judgment, stipulation to extend time for settling bill of exceptions and copies of exhibits numbers three (3) and six (6). That I have compared the said copies with the originals thereof now remaining on file and of record in my office; that they are true and correct copies thereof, and of the whole thereof.

66

In witness whereof I have hereunto set my hand and the official seal of said court at the city of Marquette, in said district and division, this thirtieth (30th) day of January, A. D. one thousand eight hundred and ninety-three.

[SEAL.] FRANCIS M. MOORE,
Deputy Clerk.

67 United States Circuit Court of Appeals for the Sixth Circuit.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } No. 103.

Error to the circuit court of the United States for the western district of Michigan, southern division.

Before Taft and Lurton, circuit judges, and Swan, district judge.

This suit was brought in ejectment in the circuit court for the county of Chippewa, and was removed by the defendant to the United States circuit court for the western district of Michigan, southern division, where it was tried in September, 1892.

The premises described in the declaration and sought to be recovered are: "An undivided one-half interest in private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the waters of St. Mary's river from the river bank on said lot to the thread of the stream of said river which forms a part of said lot and all riparian rights belonging and attached thereto, and being a part thereof."

68

The real controversy is not over any of the dry land embraced within the lines of private claim number three, as defined by the survey thereof, but concerns the riparian rights appurtenant thereto, which, it is claimed have been invaded by the construction by the United States of one of the piers which form a part of the St. Mary's Falls ship canal.

The defendant in error has no personal interest in the controversy, and is in possession of the pier in question simply as an employé of the United States, being the superintendent, and in charge of the canal.

For many years prior to 1850, the lands, in part at least, at the locality in question were occupied by parties who had no title thereto, but claimed equitable rights by virtue of long-continued possession. Repeated attempts were made to obtain recognition of their rights from Congress, but prior to said date they were unavailing. In 1850, however, Congress passed an act (9 Statutes at Large, p. 469,) which provided that the register and receiver of the land office at Sault Ste. Marie should be empowered and authorized to examine and report upon claims to lot at Sault Ste. Marie, according to the provisions of the act, and pursuant to instructions of the Commissioner of the General Land Office

The second section of the act provided that:

"The said Commissioner shall cause the register and receiver to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie, and it shall be the duty of the Secretary of War to direct the proper military officer, on application of the register and receiver, to designate or cause to be designated, upon the map aforesaid, the position and extent of lots necessary for military purposes, as also the position and the extent of any other lot, or lots, which may be required for other public purposes, and also the position and extent of the Indian agency tract, and of the Indian reserve."

69

Section 7 of the act provides that on the completion of certain preliminary maps and abstracts by the land officers, the surveyor general at Detroit should dispatch a skillful deputy to the Sault Ste. Marie, and "that he shall proceed forthwith to lay off and survey the village of Sault Ste. Marie into town lots, streets, avenues, public squares, outlots, having regard to the lots and streets already actually surveyed, existing or established, and having regard also to the existing limits and extent of lots covered by the claims which shall have been adjudicated by the register and receiver; and after such surveys shall have been completed, the aforesaid deputy shall prepare a plat, exhibiting, in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots and the public lots, and also the outlots, designating the lots reserved for military or other purposes, according to the extent and limits of the same, as fixed by the proper military officers, etc."

This survey was made by Thomas Whelpley in 1855, and by it the land in controversy is located and described as "Private land claim number three." The plat and survey were approved in Sep-

tember, 1855, as recited in the patent of the land made by the United States in 1874. The pier, as originally built, crossed a part of the riparian frontage of private claim number three.

The field-notes of the survey made by Thomas Whelpley show that private claim number three was described by metes and bounds, and that one boundary was "along the right bank of Ste. Marie river."

This claim was patented by the United States to Samuel
70 Peck and the heirs of Franklin Newcomb, October 6, 1874, and was described by reference to said survey. This grant was in these words and figures:

"THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, under the provisions of the act of Congress, approved the 26th day of September, 1850, entitled 'An act providing for the examination and settlement of claims for land at the Sault Ste. Marie, in Michigan,' the claim of Samuel Peck and the heirs of Franklin Newcomb has been confirmed to a tract or parcel of land designated on the connected plat of survey, approved under the date of September 4th, 1855, by the surveyor general at Detroit, made pursuant to the act aforesaid as lot number three, containing nineteen acres and forty-five one-hundredths of an acre, in section one, in township forty-seven north of range one west and in section six, in township forty-seven north of range one east, in the district of lands subject to sale at Marquette, formerly Sault Ste. Marie, in the States of Michigan. And whereas, there has been deposited in the General Land Office of the United States a certificate No. 111, of the register and receiver at Marquette, Michigan, whereby it appears that payment has been made in full, according to law, of the amount of assessment on said claims.

Now know ye: That the United States of America in consideration of the premises and in conformity to the provisions of the act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said Samuel Peck, and heirs of Franklin Newcomb, and to their heirs, the tract or parcel of land above described; to have and to hold the same, together with all
the rights, privileges and immunities and appurtenances of
71 whatever nature thereunto belonging, unto the said Samuel Peck and heirs of Franklin Newcomb and to their heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

[SEAL.]

Given under my hand, at the city of Washington, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

By the President: U. S. GRANT,
By S. D. WILLIAMS, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office."

By an act of Congress, approved August 26, 1852 (10 Statutes at Large, p. 35), there was granted to the State of Michigan a strip of land four hundred feet in width through the military reservation at Sault Ste. Marie, to be used for the construction of a ship canal at that point, and by the same act 750,000 acres of land were granted to the State to aid in its construction. The act provided that the selection and location of the site should be subject to the approval of the Secretary of War. The site selected under the act was so approved, in 1853, by Hon. Jefferson Davis, then Secretary of War. The canal was begun in 1853 and completed, as originally constructed, in 1855.

The river in front of private claim number three was navigable in its natural state, but immediately above were the rapids and falls, to avoid which the canal was built. This river with
72 its connecting waters forms a very important highway for interstate and international commerce.

By act of Congress of August 14, 1876 (19 Statutes at Large, 132), the sum of $130,000 was appropriated for the repair, preservation, construction and completion of this canal, "to be expended under the direction of the Secretary of War." The plan of the work was adopted in the spring of 1877 by the corps of United States engineers and the War Office. The construction of the pier in question was commenced in 1877 and completed in 1881. Congress has at all times recognized the national character of the work, making at different times very large appropriations for the canal (16 Statutes at Large, pp. 224 and 402). In 1881, the States of Michigan transferred the canal to the United States. (See Howell's Statutes, sec. 5502.)

The canal was built entirely within the military reservation belonging to the United States, and if it infringes upon plaintiff's rights it is purely because it crosses more of his riparian frontage than did the piers of the canal which was there at the time of the confirmation of his title to private claim number three in 1855. Upon these facts the court below directed a verdict for the defendant.

LURTON, circuit judge, after stating the facts as above, delivered the opinion of the court:

There are two preliminary questions for decision.

1. Is this a suit against the United States or one by which it will be concluded?

2. If the circuit court obtained jurisdiction to entertain and determine the cause, did an appeal lie to this court from its judgment?

1. Upon the submerged land forming the bottom of St. Mary's river the Government has erected a pier in front of the up-
73 land owned by him. The pier covers the entire water front of plaintiff, and is upon and within the riparian rights which he sets up. The pier is a prolongation westward into deep water of the banks of the Government canal, shelters the Lake Superior en-

trance to the canal and is such an extension thereof as to cut off the plaintiff's direct access to deep water. The defendant is the superintendent of the canal and the officer in charge and possession of the pier, holding same for the Government.

The suit is one in ejectment and the sole defendant is this agent and official of the Government. His defense is that the Government had a paramount right to place the pier where it stands. That under the power conferred by the Constitution over interstate commerce the control of the Government of the United States over navigable waters thereof is absolute and conclusive, and that the title of the plaintiff was, and is, subordinate to the power of the United States to provide for the safe and convenient navigation of the St. Mary's river. That it might therefore lawfully erect within the banks of the river, and upon the permanently submerged bottom thereof, such dams, piers and light-houses as will in its judgment contribute to the use of said river by interstate and international commerce.

Can the merits of this justification set up by defendant be determined, or must we upon the suggestion that the defendant holds under the right and title of the United States, desist from inquiring whether that title thus interposed is a good and sufficient answer to the title and right of the plaintiff?

Except where Congress has provided the United States cannot be sued. This proposition is axiomatic. But the doctrine has no application to officers and agents of the United States, who while in possession are sued in ejectment by one claiming the title
74 and right of possession. When such officer and agent is sued, and he undertakes to justify and defend his possession by setting up and relying upon the title and right of the United States, a judicial question is presented, and the court may inquire into such title, and determine whether it is the superior right and title, and render judgment as the right may appear. This has been the well-settled practice and rule of the United States court, and in the well-considered case of United States *vs.* Lee, reported in 106 U. S., 196, the doctrine was thoroughly considered and the cases elaborately reviewed by Mr. Justice Miller, who delivered the opinion of the court. When a suit may be conducted alone against the party in possession, as is the rule in ejectment, the person under whom the defendant claims is not a necessary party. The judgment in this case will not conclude or estop the United States, for the reason that it is not a party, and cannot be made a party without its consent.

Carr *vs.* United States, 98 U. S., 433.

In United States *vs.* Lee, the court said in regard to the effect of the judgment in that case:

"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of Carr *vs.* United States, already

referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all of the remedies which the law allows to every person, natural or artificial, for the vindication or assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of
75 ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined, or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution" (106 U. S., 222). That decision upon its reasoning was sound and meets the approval of this court. The constitutional provision that "no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," finds its strongest safeguard and most efficient vindication in the doctrine so ably presented by the learned judge who spoke for the majority of the court in that case. The attention of the court has been called to the late decisions of the same court in the cases of Stanley *vs.* Schwalby, 147 U. S., 508, and Hill *vs.* United States, Supreme Court Reporter, vol. 13, No. 28, decided May 15, 1893.

In the first of these cases, Stanley *vs.* Schwalby, the suit was an action of trespass to try title. The property involved was the military post at San Antonio, Texas. The defendants were Gen. Stanley and other officers of the United States. The suit, though it involved the title and possession of the United States to one of its military posts, was maintained. The reporter's head-note to the opinion is somewhat misleading in so far as he states that "for purposes of jurisdiction there is no distinction between suits against the Government directly, and suits against its property." The jurisdiction would not exist unless permitted by Congress,
76 where it was directly against the Government, while, as decided in that case, if the suit be against one in possession, and he claims under the Government, the jurisdiction does exist. In that very case the court said in regard to the latter class of cases that, "In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him." In this class is included United States *vs.* Lee, 106 U. S., 196, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be lawful, and therefore is insufficient as a

defense. "The statutes of limitation were held applicable," upon the express ground that "as an action could have been brought at any time after adverse possession was taken, against the agents of the Government through whom that was done, and by whom it was retained, the objection cannot be raised against them that the statute could not run because of inability to sue." (147 U. S., 519.)

The case of Hill *vs.* United States has no application. The action was directly against the United States for a tort and was sought to be sustained under the act of March 3, 1887, C., 359, by which Congress provided that the United States might be sued either in the Court of Claims or in the circuit court of the United States in cases not sounding in tort. The case is in accord with United States *vs.* Jones, 131 U. S., 1; Langford *vs.* U. S., 101 U. S., 341, and U. S. *vs.* Great Falls Mfg. Co., 112 U. S., 645, and *id.*, 124 U. S., 581.

77 2. We are of opinion that the plaintiff's right to an appeal or writ of error to this court was clear. Sec. 6, of the act of 1891, ch. 517, establishing the United States circuit court of appeals, provides, "that the circuit — of appeals * * * shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

The preceding section specifies with particularity the cases in which an appeal lies direct from the district or circuit court to the Supreme Court.

The case under consideration does not fall in any of the classes specified. The appeal must therefore be to the circuit court of appeals.

3. This brings us to a consideration of the claim and title of the plaintiff to the *locus in quo*. The *terra firma* owned by him is not involved. What is his title to the submerged land in front of his undisputed upland?

The canal pier was constructed upon land permanently submerged under some five feet of water. The structure was most manifestly a necessity to the safe and convenient use of the canal. The canal was a necessity to the safe navigation of a great public highway, of which it forms a part. The commerce passing through it is equalled only by that of a few of the great navigable streams of the world. Has the plaintiff such a title to the land lying between the shore of this great highway of commerce and the middle thread of the stream, as to make the defendant a trespasser and the structure placed there in aid of navigation a nuisance which plaintiff as the owner of the adjacent shore may abate and remove?

78 Must the United States, before building piers, light-houses and other structures in aid of navigation, condemn and purchase the beds of navigable streams and inland seas, upon which such improvements must be supported? If the plaintiff has such a property right in the submerged land beneath the river as cannot be taken or used without just compensation and by due process of law, for the purpose to which it has been devoted, then the de-

fendant is a trespasser, and he cannot justify his occupation of the premises by the title and right of the Government whose servant he is.

At the outset we may say that if plaintiff's title to this submerged land depends upon a construction of the grant of the United States under which he holds, that his pretentions to such a title as will support ejectment must fail. The field-notes of the survey called for in the patent to Peck and heirs of Newcomb, show conclusively that the land patented to him extended "along the right bank of the Ste. Marie river." The firm upland was alone surveyed and measured.

The rule of the common law was that the title of one owning land bordering on a river in which the tide ebbed and flowed, extended only to the margin of ordinary high water. The title to all land between the shores and below ordinary high water was vested in the Crown. Above the ebb and flow of the tide the title of a riparian proprietor extended to the middle thread of the stream. The ebb and flow of the tide in the short streams of that insular country was in fact and law the sole test of actual navigability. But in this country the situation is entirely different. A large majority of our rivers are navigable in fact which are wholly unaffected by tide, and many others are equally navigable above the ebb and flow, which affects them near the sea. The common-law
79 test of navigability, said Justice Bradley, in Barney *vs.* Keokuk, 94 U. S., 338, "had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy." In the case of The Genesee Chief, 12 How., 443, the common-law test of navigability was considered and the doctrine established that the admiralty and maritime jurisdiction granted to the Federal Government by the Constitution extended to all public navigable rivers and lakes, where commerce is carried on between the States or with foreign nations. Subsequently the same court in The Daniel Ball, 10 Wall., 563, said as to the test of navigability of rivers and inland seas that "they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary mode of travel and trade on water." This definition was followed and affirmed in Parker *vs.* Bird, 137 U. S., 673. Since the Genesee case, the courts of the United States have steadily held that the test of navigability was not the flow of the tide, but that navigability in fact furnished the standard by which jurisdiction in admiralty and riparian rights were to be determined under United States patents.

Railroad *vs.* Schurmier, 7 Wall., 272.

Parker *vs.* Bird, 137 U. S., 673.

The doctrine that the title to the submerged lands within the banks of navigable rivers, belongs to the States respectively within

which such rivers are situated, and not to the United States, was settled at an early day and has never since been questioned.

In Pollard's Lessee *vs.* Hagan, 3 How., 219, it was held that a patent by the United States to lands in the bed of the Ala-
80 bama river was absolutely void, inasmuch as the United States by its acquisition of that part of Alabama through treaty with Spain, had never acquired any title to the soil under navigable rivers, and none had been conferred by the Constitution of the United States. It was also held that, new States coming into the Union, entered it with precisely the same reservation as to the soil under their navigable waters, as was the case with the States originating the Union. (3 How., 219.) To the same effect are the cases of Martin *vs.* Waddell, 16 Pet., 367, and Goodtitle *vs.* Kibbe, 9 How., 471. It is true that these cases involved the beds of streams affected by tides, but the principles upon which the cases rested applied equally to streams navigable in fact, and above the ebb and flow of the tide. In Barney *vs.* Keokuk, *supra*, the court said, speaking of these cases, "In our view of the subject the correct principles were laid down in Martin *vs.* Waddell, 16 Pet., 367, Pollard's Lessee *vs.* Hagan, 3 How., 212, and Goodtitle *vs.* Kibbe, 9 *id.*, 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of The Genesee Chief, 12 *id.*, 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of the water. The cases in which this court has seemed to hold a contrary view depended, as most cases must
81 depend, on the local laws of the States in which the lands were situated."

In the late case of Illinois Central Railroad *vs.* Illinois it was expressly held that the ownership of and dominion and sovereignty over lands covered by the waters of Lake Michigan, though unaffected by the tide, belonged to the States within which such submerged land was situated. 146 U. S., 387.

The effect and construction of a United States land patent must, in the very nature of the subject, be a question for the United States courts to determine for themselves, without reference to the rules of construction adopted by the States for their grants.

Barney *vs.* Keokuk, 94 U. S., 338.

Parker *vs.* Bird, 137 U. S., 661.

It is deducible, therefore, from the decided cases:

First. That the United States never had or asserted any title to the land under the waters of the Ste. Marie river, and could not by its grant convey to a patentee any title whatever.

Second. That the only reasonable construction to be placed upon the acts of Congress concerning the survey and sale of the public lands, and the settled line of decisions concerning such patents, would be to limit the effect of the patent under which the plaintiff holds to the *terra firma* bounded by the margin of the Ste. Mary's river.

Railroad *vs.* Schurmier, 7 Wall., 272.
Parker *vs.* Bird, *supra.*
Barney *vs.* Keokuk, *supra.*

We then have a case where the grant to plaintiff does not by construction extend his title to any part of the soil beneath the
82 waters of the stream along which it lies. This brings us to a consideration of the effect of the law of the State of Michigan, upon the title of the plaintiff. The title to the soil under the navigable rivers of Michigan remained in the State, as we have already shown. "If," as observed in Barney *vs.* Keokuk, that State "chose to resign to the riparian proprietor rights which properly belong to it in its sovereign capacity, it is not for others to raise objecjections." This the State of Michigan has done. As an incident to ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land to the center of the stream.

Ryan *vs.* Brown, 18 Mich., 207.
Larman *vs.* Benton, 8 Mich., 18.
Pere Marquette Boom Co. *vs.* Adams, 44 Mich., 403.

This, being the well-defined law of Michigan, is the law applicable to the rights of the plaintiff in this case, and controlling as to the *locus in quo.* Under the law of Michigan, the plaintiff is therefore seized of the legal title to the submerged land upon which the United States has constructed the pier in question.

But while the plaintiff, under the law of Michigan, is seized of the legal title to the soil under the water, yet in the very nature of the property such seizure is of the bare technical title. The State of Michigan was a part of the Northwest Territory ceded by the State of Virginia to the United States for the public benefit. The statute authorizing the session, the deed of cession and the ordinance of 1787 providing for the government of that Territory alike provided that the navigable waters of that cession should be "com-
mon highways and forever free, as well to the inhabitants of
83 the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, import or duty therefor." These limitations on the powers of the Northwest Territory, and afterwards upon those of the Territory of Michigan, ceased to have operative force upon the State of Michigan when admitted into the Union, in so far as their force depended upon the deed of cession or the ordinance of Congress, or were in diminution of the powers

attaching to the other States of the Union. When admitted into the Union, she entered on an equal footing with the original States, and could exercise over her rivers and lakes the same sovereign powers as pertained to the old States with respect to such subjects. But this provision concerning her navigable streams was precisely the limitation under which all such streams were controlled by the older States, after the adoption of the present Constitution. In Martin *vs.* Waddell, 16 Pet., 410, the court said: "When the Revolution took place, the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution." By that Constitution the States are prohibited from imposing any tonnage duty without the consent of Congress. Article 1, section 10, and by the eighth section of the same article, the States granted to the Congress of the United States the power "to regulate commerce with foreign nations and among the several States." This power operates whenever Congress elects to legislate upon this particular subject, as a limitation upon the power of the States over the channels of interstate commerce within the States.

In Gibbons *vs.* Ogden, 9 Wheat., 196, Chief Justice Marshall said, as to this power to regulate commerce: "It is the power to
84 regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all other vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case. If, as has been always understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

In Gilman *vs.* Philadelphia, 3 Wall., 724, the court said: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from obstruction to their navigation, interposed by the States or otherwise, to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament of England."

It must from these constitutional principles follow that the State of Michigan held the soil beneath her navigable rivers under a high

public trust to forever preserve them free as public high-
85 ways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under her law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the rights of navigation, and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce, and as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the owner of the shores. A distinction must be recognized between that which is *jus privitum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public right of navigation, and the control of Congress over that right. This much seems expressly ruled in Illinois Central Railroad *vs.* Illinois. Such submerged lands can only be disposed of by the State, when that can be done without injury to the interest of the public in the waters and subject to the paramount right of Congress to control their navigation so far as necessary for the regulation of commerce with foreign nations and between the States. 146 U. S., 387. The right of access to deep water, which was considered in Atlee *vs.* Packet Company, 21 Wall., 389, and Yates *vs.* Milwaukee, 10 Wall., 497, and Gilman *vs.* Philadelphia, 3 Wall., 724, is likewise a right subordinate to the power of the State and the Federal Government to control the stream in so far as necessary for purposes of commerce. In Atlee *vs.* Packet Company, it was held that, though the right of access to deep water existed in the defendant Atlee, regardless of his title to the soil, and though this right carried with it the right to
put in and maintain a pier to utilize the right, yet, if such
86 pier interfered with navigation, it becomes a nuisance, and could be removed without compensation, if constructed without authority of the State or United States. In Yates *vs.* Milwaukee, the point of decision was that this right of access could not be arbitrarily destroyed or injured by a city ordinance condemning a pier as a nuisance. That it must be shown by due process of law to be a nuisance in fact as affecting navigation before it could lawfully be removed. In Gilman *vs.* Philadelphia, the doctrine that in the absence of congressional regulation concerning the navigation of a river wholly within the limits of one State, that it was within the power of the State to authorize a bridge over the stream, as in itself an aid to commerce, was again announced in Wilson *vs.* The Blackbird Creek Marsh Co., 2 Peters, followed and approved. The significance of that case, as it affects this, was the refusal to enjoin the erection of the bridge on the complaint of one owning land on the shores above, whose access to and use of the stream was thereby injured. His property had not been taken. The injury to him was consequential, and he was held to be without remedy. Here the plaintiff has sustained an injury which is wholly a consequence of the erection of a structure by Congress in aid of the general and

public right of navigation. If Congress may lawfully use the soil as a support for such structures, without acquiring the naked title outstanding in the plaintiff, then for such injuries as are merely consequential, is a case of damage without an actionable injury. A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under authority of subsequent congressional legislation.

87 In such case, the improvement being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of The Monongahela Navigation Company *vs.* United States, 148 U. S., 312. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also must be paid for. The plaintiff in the case before us had made no improvements for either public or private uses; no property of his has been invaded, none has been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this in turn involves the necessary uses of the submerged lands, in so far as such use was essential to the maintenance of the public highway.

What is a proper exercise of this power of Congress to aid navigation, seems to be for Congress to determine. The case of South Carolina *vs.* Georgia is an illustration of the great discretion reposed in Congress as to the selection of means proper to the improvement or protection of such public highway. In that case it was decided that Congress has the power to close one of several channels in a navigable stream if, in its judgment, the navigation of the river will be thereby improved. The case did not turn upon the fact that the bill in the case was filed by the State of South Carolina, but was put upon a construction of the power of Congress to determine the means by which the navigation of a river may be improved.

See also the case of Pennsylvania *vs.* The Wheeling Bridge Company, 18 How., 421, and Wisconsin *vs.* Duluth, 96 U. S., 379.

If the title had remained in the State, the conclusion would be the same. The State would hold subject to the public use,

88 and its property right in the submerged soil of a navigable stream would be subservient to the power of Congress to regulate navigation, and the use of such soil as a support for a structure in aid of navigation would not have been the taking of the private property of the State, within the meaning of the constitutional provision inhibiting it without compensation. This point was expressly ruled upon in a very able opinion by the late Justice Bradley, in Stockton *vs.* Baltimore & N. Y. R. R. Co., 32 Fed. Rep., 19. The Hawkins Point Light-house case, reported in 39 Fed. Rep., 77, was a case identical in principle to the one under consideration. The plaintiff, under a grant from the State of Maryland, was the owner of the fee in the submerged land under the Patapsco river. The United States erected a light-house supported on the soil owned

by plaintiff. Suit in ejectment was brought upon the theory that the keeper of the light-house was a trespasser, the site never having been condemned, nor any compensation paid. It was held upon elaborate argument that the United States, in thus erecting a light-house in aid of navigation, by authority of Congress, was not taking private property without compensation. That plaintiff's title and ownership was necessarily subservient to the use of the same in aid of public navigation.

We have been conscious of the importance of the question, both to the Government and riparian proprietors. This must be an apology for the great length to which this opinion has been extended.

The conclusion we have reached is, that there is no error in the judgment of the circuit court. The plaintiff has no such ownership of the *locus in quo* as makes its use for the purposes to which it has been devoted a taking of private property within the meaning of the Constitution.

The judgment is therefore affirmed.

89 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1892.

GILMORE G. SCRANTON
v.
EBEN S. WHEELER. } No. 103.

In error to the circuit court of the United States for the western district of Michigan.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Michigan, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs; and it is further ordered that said defendant recover of the plaintiff, Gilmore G. Scranton, his costs herein expended in the sum of twenty dollars and have execution therefor.

[Endorsed:] United States circuit court of appeals for the sixth circuit. No. 103. October term, 1892. Gilmore G. Scranton *vs.* Eben S. Wheeler. Judgment. Filed June 22d, 1893. Walter S. Harsha, clerk. Copy.

90 *Petition for Writ of Error.*

To the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States:

Your petitioner, Gilmore G. Scranton, respectfully shows—

That he is the plaintiff in an action of ejectment against Eben S. Wheeler to recover possession of certain lands in Chippewa county,

in this State, both your petitioner and said Wheeler being at the time of the commencement of said action citizens and residents of the State of Michigan; that said action was commenced in the circuit court for the county of Chippewa, a State court, but the same was on the petition of said Wheeler removed to the circuit court of the United States for the western district of Michigan for the reason that the United States was the real party defendant and the case involved the application and construction of certain acts of Congress; that said cause was tried in said Federal court and a final judgement entered therein in favor of the defendant; that your petitioner removed said cause by writ of error to the United States circuit court of appeals for the sixth judicial circuit for review; that said cause was duly heard in said court of appeals and said court rendered judgement therein affirming the judgement of the circuit court of the United States for the western district of Michigan on the — day of September, 1893; that the amount involved under dispute in said cause exceeds the sum of five thousand dollars.

That said cause is not one in which the decision of said court of appeals is final, and your petitioner is of right entitled to a writ of error removing said cause to the Supreme Court of the United States for review.

Therefore he prays the allowance of a writ of error to re-
91 move said cause from said circuit court of appeals to the Supreme Court of the United States for review, and he herewith tenders a bond as required by the rule.

GILMORE G. SCRANTON.

92 In the Supreme Court of the United States.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error.

And now comes the said plaintiff in error and says that the United States circuit court of appeals for the sixth circuit erred in the ruling and judgment made and entered in said cause in said court as follows:

1. The said court of appeals erred in holding and deciding that the plaintiff in error had no such ownership in the land and premises described in the declaration filed in said cause as made the taking of it by the United States a taking of private property without compensation within the meaning of the Constitution of the United States.

2. The said court of appeals erred in holding and deciding that the United States had the lawful right to enter upon the land and premises described in the plaintiff's declaration and build or construct the pier described in the record thereon and to maintain said pier thereon and to exclude the said plaintiff in error from all right of possession or use thereof and from passing over and across the same.

3. The said court of appeals erred in holding and deciding that

the said plaintiff in error took his title to the land beneath the water to the centre of the stream subject to public use and to the right of Congress to take the same for public purposes in the regulation and improvement of the navigation of the stream without compensation.

4. The said court of appeals erred in holding and deciding
93 that under the testimony in the case the plaintiff was not entitled to recover and in affirming the decision and judgment of the circuit court of the United States for the western district of Michigan, northern division, where said cause was tried holding and deciding that said plaintiff in error could not recover, and directing the jury to render verdict in favor of the defendant.

5. The said court of appeals erred in affirming the judgement of the circuit court of the United States for the western district of Michigan, northern division, entered in said cause.

JOHN C. DONNELLY,
Attorney for Pl'ff in Error.

Oct. 11, 1893.

94 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Gilmore G. Scranton, plaintiff in error, and Eben S. Wheeler, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

I hereby accept service of this writ of error.
Oct. 13, 1893.

L. G. PALMER,
U. S. Att'y, West. Dist. of Mich.

95 *Bond on Writ of Error.*

Know all men by these presents that we, Gilmore G. Scranton, as principal, C. S. Osborne and E. S. B. Sutton, as sureties, are held and firmly bound unto Eben S. Wheeler, his heirs, executors, administrators, or assigns, in the just and full sum of five hundred dollars, lawful money of the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-second day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a session of the United States circuit court of appeals for the sixth circuit, in a cause therein pending, between Gilmore G. Scranton, as plaintiff in error, and the said Eben S. Wheeler, as defendant in error, upon the — day of September, A. D. 1893, a judgment was rendered against the said plaintiff in error and in favor of the said defendant in error, affirming the judgment of the circuit court of the United States for the western district of Michigan theretofore rendered in said cause, and for the reversal of which the said plaintiff in error has prosecuted his writ of error in said United States circuit court of appeals, and the said Gilmore G. Scranton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court of appeals to reverse the judgment of the said United States circuit court of appeals in said suit, and a citation, directed to the said Eben S. Wheeler, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be held at the city of Washington 30 days from the date thereof:

96 Now, therefore, the condition of the above obligation is such that if the said Gilmore G. Scranton shall prosecute said writ of error and answer all damages and costs if he fail to make his plea good in said Supreme Court of the United States, then the above obligation to be void; else to remain in full force and virtue.

GILMORE G. SCRANTON. [L. S.]
C. S. OSBORNE. [L. S.]
ELMER S. B. SUTTON. [L. S.]

STATE OF MICHIGAN, } ss:
Western District of Michigan, County of Chippewa, }

Be it remembered that before me personally appeared Charles S. Osborn and Elmer S. B. Sutton, sureties on the foregoing bond, and each for himself did duly swear that he was worth the sum of five

hundred dollars over and above all debts, liabilities, and exemptions and offsets.

Dated Sept. 22nd, 1893.

[SEAL.] JOHN A. COLWELL,
United States Commissioner for the Sixth Judicial Circuit.

I, John A. Colwell, United States commissioner for the sixth judicial circuit, do hereby certify that I am personally acquainted with the sureties named in the foregoing justification, and that in my opinion they are well qualified to become sureties on said bond.

[SEAL.] JOHN A. COLWELL,
U. S. Circuit Court Commissioner.

Approved:
H. B. BROWN.

97 UNITED STATES OF AMERICA, *ss:*

To Eben S. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein Gilmore G. Scranton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

HENRY B. BROWN,
Associate Justice Sup. Court U. S.

I hereby accept service of this citation.
Oct. 13, 1893.

L. G. PALMER,
U. S. Att'y, West. Dist. of Mich.

98 *Petition to Send Exhibits to Supreme Court.*

United States Circuit Court of Appeals for the Sixth Circuit.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } No. 103.

To the United States circuit court of appeals:

Your petitioner, Harlow P. Davock, respectfully shows to this court that he is the attorney for Gilmore G. Scranton, the plaintiff in the above-entitled cause.

Your petitioner further shows that a judgment has been rendered

in this court affirming the judgment of the court below in favor of defendant in said cause.

Your petitioner further shows that upon application to the Supreme Court of the United States a writ of error and citation has been issued out of the Supreme Court of the United States in the above-entitled cause, and the same is returnable thirty days after the 30th day of September, A. D. 1893.

Your petitioner further shows that it is necessary that certain original papers should be inspected in the Supreme Court of the United States upon such writ of error; that said original papers consist of certain maps included in Exhibits A and One to Ten, inclusive, and he pravs that the same may be returned with said writ of error, and that this court may make such rule or order for the safe keeping, transporting, and return of such original papers
99 as to them it may seem proper and meet.

And your petitioner will ever pray.

HARLOW P. DAVOCK.

STATE OF MICHIGAN, } ss:
County of Wayne, }

On this nineteenth day of October, A. D. 1893, before me personally came the above-named Harlow P. Davock and made oath that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be on information and belief, and as to those matters he beheves it to be true.

ELBRIDGE F. BACON,
Notary Public, Wayne County, Michigan.

100 *Order to Send Exhibits to Supreme Court.*

United States Circuit Court of Appeals for the Sixth Circuit.

GILMORE G. SCRANTON, Plaintiff in Error,
vs.
EBEN S. WHEELER, Defendant in Error. } No. 103.

In error to the circuit court of the United States for the eastern district of Michigan.

Suit pending in the United States circuit court of appeals for the sixth circuit, at Cincinnati, on the — day of October, A. D. 1893.

In this cause, on reading the petition of Harlow P. Davock, attorney for the plaintiff in error in said cause, praying that certain exhibits may be returned to the Supreme Court of the United States, together with the writ of error issued out of said Supreme Court in said cause, it is ordered that the certain original maps used in said cause, to wit: *Exhibit*

Exhibit 1, tracing Carlton map, entrance to canal;

Exhibit 2, blue print Jeff. Davis map of canal;

Exhibit 4, tracing and large scale showing P. C. 3 and old canal entrance;

Exhibit 5, tracing in large scale showing P. C. 3 and new canal entrance;

Exhibit 7, lake-survey chart of 1857;

191 Exhibit 8, lake-survey chart down to September, 1891;

Exhibit 9, blue print of Whelpley survey;

Exhibit 10, blue print of J. B. Davis map;

Exhibit A, blue print Gen. Weitzel's map, 1876,

be transported and returned, together with the writ of error in said cause, to the Supreme Court of the United States, and after the determination of said cause be returned to the circuit court of the United States for the western district of Michigan, that being the court in which said exhibits were originally introduced.

WM. H. TAFT,
Circuit Judge and ex Officio Judge U. S. Circuit Court of Appeals for the Sixth Circuit.

Oct. 20th, 1893.

102 United States Circuit Court of Appeals for the Sixth Circuit.

I, Walter S. Harsha, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing 101 pages, numbered from 1 to 101, inclusive, contain a true copy of the record and proceedings in the case of Gilmore G. Scranton *vs.* Eben S. Wheeler, No. 103, October term, 1892, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of Cincinnati, this 28th day of October, A. D. 1893.

WALTER S. HARSHA,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[Endorsed:] United States circuit court of appeals for the sixth circuit. Gilmore G. Scranton, pl'ff in error, *vs.* Eben S. Wheeler, def't in error. Clerk's certificate.

Endorsed on cover: Case No. 15,139. U. S. Circuit court of appeals, 6th circuit. Term No. 234. Gilmore G. Scranton, plaintiff in error, vs. Eben S. Wheeler. Filed November 2d, 1893.

TRANSCRIPT OF RECORD.

164-89

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~596~~. 264

OCTAVIA J. PARSONS, PLAINTIFF IN ERROR,

vs.

GUSTAV VENZKE, FRED. B. TOWNSEND, AND L. E. WOOD.

IN ERROR TO THE DISTRICT COURT OF RICHLAND COUNTY, STATE OF NORTH DAKOTA.

FILED APRIL 20, 1895.

(14,878.)